85-298

No. .....

Supreme Court, U.S.
FILED
AUG 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

vs.

ANDREW K. BURT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August 23, 1985

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QUESTION PRESENTED FOR REVIEW

May Colorado's long-arm statute, C.R.S. § 13-1-124, be applied, consistent with the Fifth and Fourteenth Amendments to the United States Constitution, to confer *in personam* jurisdiction over a Nebraska resident whose sole contact with the forum state was to respond to a private, solicited inquiry about the performance of a former student in a Nebraska orthopedic residency program in light of the petitioner's duty to respond to such inquiries wherever any of his ex-students may choose to reside and seek academic references?

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JOHN F. CONNOLLY,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, John F. Connolly, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 20, 1985.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 757 F. 2d 242 and appear as Appendix A hereto. The Memorandum Opinion and Order of the District Court for the District of Colorado, which is not reported, is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 20, 1985. A timely petition for rehearing *en banc* was denied on June 17, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATUTORY PROVISION INVOLVED

C.R.S. § 13-1-124 (1973 & Cum. Supp. 1984):

> *Jurisdiction of Courts.* (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and, if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> (c) The ownership, use, or possesison of any real property situated in this state;
>
> (d) Contracting to insure any person, property, or risk residing or located within this state at the time of contracting; or
>
> (e) The maintenance of a matrimonial domicile within this state with respect to all issues relating to obligations for support to children and spouse in any action for dissolution of marriage, legal separation, declaration of invalidity of marriage, or support of children if one of the parties of the marriage continues without interruption to be domiciled within the state.

———o———

STATEMENT OF THE CASE

The respondent (plaintiff below), a medical doctor, completed a residency in orthopedic surgery at the University of Nebraska medical school in 1977. Several years later, after residing in California, he moved to the State of Colorado and applied for staff privileges at certain

hospitals there. As a result, inquiries were made of petitioner, Dr. John F. Connolly, among others, concerning plaintiff's credentials and medical competence *(See* Appendix C).

Dr. Connolly, in his capacity as Chairman of the Department of Orthopedics and Rehabilitation of the University of Nebraska College of Medicine, responded to a Colorado hospital inquiry as follows:

> In reply to your inquiry about Dr. Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Appendix D. The respondent contends that as a result of this letter he was denied staff privileges at Colorado hospitals and that his reputation has been harmed.

Respondent brought suit in the United States District Court for the District of Colorado against the Board of Regents of the University of Nebraska and Dr. Connolly on claims of defamation, breach of contract, interference with prospective advantage, and outrageous conduct. Diversity jurisdiction was invoked under 28 U.S.C. § 1332. Respondent later amended his Complaint to add a claim under 42 U.S.C. § 1983 and invoking jurisdiction under 28 U.S.C. § 1331.

Dr. Connolly was, and remains, a Nebraska resident. He owns no property within the State of Colorado, and has transacted no business within the State of Colorado. In short, Dr. Connolly's only contact with the State of Colorado, and the only contact that has been alleged, is

the mailing of the above-quoted letter (Appendix D) to Presbyterian Hospital in Denver, Colorado on October 21, 1980. Appendix B at App. 13 & 15.

The Board of Regents and Dr. Connolly moved to quash summonses and dismiss the Complaint on alternative grounds of lack of *in personam* jurisdiction, Eleventh Amendment immunity, and failure to state a claim upon which relief could be granted. The District Court dismissed the Board of Regents on Eleventh Amendment grounds and dismissed the Complaint against Dr. Connolly for lack of *in personam* jurisdiction, finding that Dr. Connolly's only contact with the State of Colorado was the mailing of his October 21, 1980 letter. The District Court held that although the conduct in question was technically within the reach of the tortious act provision Colorado's long-arm statute, C.R.S. § 13-1-124(1)(b) (1973 & Cum. Supp. 1984), minimum contacts required for the exercise of *in personam* jurisdiction were absent here.

In addressing the foreseeability of being haled into a foreign forum under *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the Court said:

> I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Appendix B at App. 16.

Respondent appealed the dismissal of his claims against the petitioner to the United States Court of Appeals for the Tenth Circuit, which, in a split (two to one)

over Dr. Connolly was precluded by the requirements of federal due process because he lacked sufficient minimum contacts with the forum state.

Subsequent to the district court's decision below, the Supreme Court decided *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), and *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). We believe these two cases require us to reverse the district court's conclusion in this case.

The Court in both *Keeton* and *Calder* recognized that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton*, 104 S.Ct. at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)); *Calder*, 104 S.Ct. at 1486 (same). The plaintiff in *Keeton*, a New York resident, brought a libel action in New Hampshire against Hustler Magazine, an Ohio corporation with its principal place of business in California. The only connection between either the plaintiff or the magazine and New Hampshire was the sale in that state of the allegedly libelous material. In upholding personal jurisdiction, the Court agreed "that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." 104 S.Ct. at 1479. The Court then concluded:

> "'"A state has an especial interest in exercising judicial jurisdiction over those who commit torts

> within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."' *Leeper v. Leeper,* 114 N.H. 294, 298, 319 A.2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36, Comment c (1971).
>
> This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."

Id. Under *Keeton,* Colorado has a significant interest in the present case.

In *Calder,* a California resident brought a libel suit in California state court against, inter alia, two employees of a national magazine who were residents of Florida and who had prepared the alleged libelous magazine article in Florida. The California Court of Appeals held that personal jurisdiction over the Florida residents was proper. The Supreme Court noted:

> "[T]he [California] court concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."

Calder, 104 S.Ct. at 1485-6 (footnote omitted). The Supreme Court affirmed, approving the "effects" test employed by the California court. *See id.* at 1486 n. 6. The

Court concluded that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California," *id.* at 1487, and held that "jurisdiction over [the Florida residents] in California is proper because of their intentional conduct in Florida calculated to cause injury to [the plaintiff] in California," *id.* at 1488.

We believe this analysis is dispositive of the jurisdictional issue in this case. Although the libel in *Calder* was pursuant to a commercial enterprise, whereas here the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state. The Court in *Calder* was unpersuaded by the arguments of the defendant reporter and the defendant editor that they personally had no economic stake in their employer's sales in a distant state.

> "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works. . . ."

Id. at 1487.

Nor are we persuaded by Dr. Connolly's claim that it violates due process to hale him into court in Colo-

rado because the letter was, in effect, solicited by Dr. Burt, who gave Dr. Connolly's name to the hospitals. Dr. Burt solicited a letter of reference; he did not solicit a malicious falsehood. Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim. To the extent that Dr. Connolly's statements damaged Dr. Burt's reputation and his ability to practice his profession, the damage occurred in Colorado.

Accordingly, we conclude that the district court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment is reversed on that ground and remanded for further proceedings.

SETH, Circuit Judge, dissenting:

I must respectfully dissent.

The majority relies entirely on *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804, but in my view we have only half the elements relied on by the Court in *Calder*. There, the opinion places emphasis on the fact that the story concerned what the plaintiff did in California. Thus: "The allegedly libelous story concerned the California activities of a California resident." The Court also stated that the "article was drawn from California sources." The Court then stated the two elements:

> "In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 [100 S.Ct. 559, 62 L.Ed.2d 490]. . . ."

The Court so applies the "effects" theory where both "the focal point . . . of the story and of the harm" was in California.

In the case before us the letter was, of course, sent to Colorado but the "focal" point of the story was Nebraska. The letter was about what had taken place in Nebraska not Colorado. The story was certainly not drawn from Colorado sources. The action was initiated by plaintiff. We thus have but half a *Calder*. The opinion in *Calder* quotes and relies on the usual minimum contact cases with no comment or criticism. It states at the outset of the opinion of the defendant:

> "It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California."

The Court in a footnote quoted the exact circulation figures for the issue, 5,292,200 total and 604,431 in California. The Court had stated at the outset that:

> "The article was published in a national magazine with a large circulation in California."

The opinion contains a mixture of the minimum contact facts, minimum contact cases, and the "effects" theory. Thus it should be assumed that the "effects" basis referred to by the Court is operative in the context of the minimum contacts doctrine as pressed in the case therein quoted, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559. Thus "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *See also* our cases such as *Premier Corp. v. Newsom*,

620 F.2d 219 (10th Cir.), and *Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.), where in a specific jurisdiction case we required the minimum contact. *See also* the unilateral activity case, *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado. *See also Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.).

Again, the "story" was about what had taken place in Nebraska not Colorado. The *only* connection or contact the defendant had with Colorado was the letter he sent to the Colorado hospital in response to its request that he express an opinion as to the plaintiff's "medical knowledge, technical proficiency," and other qualifications. The plaintiff acknowledges that defendant had a duty to reply and that the hospital solicited the information. It is apparent that this solicitation can also be attributed to the plaintiff.

Again, the letter in issue was a required answer to the inquiry as to Dr. Burt's performance as an orthopedic resident in Nebraska, thus was not unsolicited or gratuitously made. Instead, the action was initiated by plaintiff. The majority opinion at page 245 quotes from *Calder* (104 S.Ct. 1482, at 1487), as to the brunt of the injury and impact on respondent. However, the sentence quoted in part continued with "and in which the *National Enquirer* has its largest circulation." The Court then continued:

> "Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article."

"Under these circumstances" thus includes the extent of the circulation in California and thus the contacts of defendants. The traditional cases were quoted following the above quotation. Again, we have the "contact" ingredient or element of what the Court calls the "impact." It is an impact theory but in a minimum contact context.

The trial court in its evaluation of the facts found that there was no factual basis for *in personam* jurisdiction over the plaintiff. It must be assumed that this included all the elements and thus a determination that the defendant could not anticipate being haled into court in Colorado. The trial court's findings are presumed to be correct. The jurisdictional issue requires and is based on an evaluation of the facts.

Keeton v. Hustler Magazine, Inc., — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790, was decided on the same day as was *Calder*. The contacts aspect was treated at some length. The Court referred to the regular monthly sales of thousands of magazines in New Hampshire and said this "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." Thus there were sufficient "minimum contacts" between defendant and the State to meet due process requirements, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559. The Court in *Keeton* was concerned with the relationship of the plaintiff to the forum State and the First Amendment issue. However, on the contacts element the Court said of the magazine:

> "But respondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises

> out of the very activity being conducted, in part, in New Hampshire."

The Court said also that the harm was done in New Hampshire and there is "no justification" for restricting libel actions to defendant's forum, and:

> "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463 [61 S.Ct. 339, 342, 85 L.Ed. 278].'"

(The Court there quoted *International Shoe.*)

Thus the Court in *Keeton* in what appears to be a specific jurisdictional case or impact case includes the minimum contact doctrine. Again, we must assume that the "impact" theory is appropriate when found in the context of minimum contacts.

As the Court did in *Calder* and *Keeton,* and in our earlier cases, the contacts of the plaintiff with the forum State must be examined. This was again emphasized by the majority and the dissent in *Helicopteros Nacionales de Colombia v. Hall,* — U.S. —, 104 S.Ct. 1868, 80 L.Ed.2d 404, which followed *Keeton* and *Calder.*

In a challenge to *in personam* jurisdiction the plaintiff has the burden of showing the basis for jurisdiction. This is not a heavy burden, but reliance cannot be placed on unsupported allegations in the complaint. These allegations are not taken as true under these circumstances in view of the burden.

In 2 Moore's Federal Practice ¶ 4.41-1[3], at 4-473 (2d ed.), the authors state:

> "On appeal, the trial court's findings on the jurisdictional question are presumptively correct and will be set aside only if clearly erroneous. Even where the trial court reached its decision on the basis of affidavits and other documentary evidence, and did not weigh conflicting evidence or evaluate witness credibility, the standard of review on appeal is the same. The court on appeal will not draw its own inferences and conclusions from the facts in the record."

A footnote quotes our *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir.).

The trial judge's evaluation of the facts developed by the affidavits should be considered as any other fact determination. The weighing of the facts is necessary in the determination of jurisdiction. *Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132.

I would affirm the judgment of the trial court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

ANDREW K. BURT,

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed October 1, 1982)

This case is before me upon motions to quash service and dismiss. The action has been commenced by a doctor presently domiciled in the state of California against the Regents of the University of Nebraska and a professor on the University of Nebraska faculty, who is also chairman of the Department of Orthopedic Surgery. The basis for the action is a letter written by Dr. Connolly, the professor, to the Director of Medical Education at Denver's Presbyterian Hospital.

Dr. Connolly's letter states that the Plaintiff has "not been recommended for Board eligibility." It is Plaintiff's theory that publication of this letter results in defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty rights protected by the federal constitution.

Defendants seek dismissal of the complaint upon grounds of immunity and upon lack of *in personam* jurisdiction. The Regents claim to be an agency of the state of Nebraska protected by the eleventh amendment. Dr.

Connolly claims the same immunity, stating he was acting, in this case, as the state's alter ego. Both Defendants further claim their minimal contacts with the state of Colorado render suit in this district an impediment to their due process rights.

Plaintiff counters these arguments first by claiming he would be without redress if the eleventh amendment were applied. He further argues Nebraska law would deny his right to sue these Defendants on his defamation claims.[1]

It seems clear to me, first, that whether the Regents are an agency of the state of Nebraska is principally dependent upon the state law. *Hamilton Mfg. Co. v. Trustees of State Colleges,* 356 F.2d 599 (10th Cir. 1966). Since the question of whether the Regents are an agency of the state of Nebraska has been answered affirmatively, *Catania v. University of Nebraska,* 282 N.W.2d 27 (Neb. 1979), the only remaining question as far as the Regents are concerned is whether the eleventh amendment immunity applies in all respects to the claims raised against them here. That question also must be answered affirmatively. *United Carolina Bank v. Regents Stephen F. Austin State University, et al.,* 665 F.2d 553 (5th Cir. 1982); *Lecompt v. University of Houston System, et al.,* 535 F. Supp. 317 (S.D. Tex. 1982); *Harris v. Arizona Board of Regents, et al.,* 528 F. Supp. 987 (D. Ariz. 1981); *Beckley v. University of Maryland, et al.,* 527 F. Supp. 174 (D. Md. 1981). It is thus evident the Defendant Regents are immune to this action, and the complaint against them must be dismissed.

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[1]Neither ground appears to me to be a valid basis for extending jurisdiction. *See United Carolina Bank v. Regents,* 655 F.2d 553 (5th Cir. 1982).

As far as Dr. Connolly is concerned, I am loath at this moment to say he is vested with eleventh amendment immunity for the simple reason the amended complaint cannot be read only as the Defendant suggests. Taking the averments pertinent to Dr. Connolly in a light most favorable to the Plaintiff, I must conclude there are indications that recovery is sought against Dr. Connolly for his individual acts that would not be in the scope of his acting as and for the state. Hence, were he otherwise subject to unqualified immunity as the state's alter ego, there is a sufficient claim against Dr. Connolly to get the Plaintiff past the eleventh amendment. Nothwithstanding, the complaint against him should be dismissed for other reasons.

Dr. Connolly has moved to dismiss on Rule 12 (b) (4) and (5) grounds. I believe the motion leads to the question of whether the case should be dismissed for lack of *in personam* jurisdiction. *Federal National Bank & Trust Co. v. Moon,* 412 F. Supp. 644 (D. Okla. 1976).

In this case I have considered whether Dr. Connolly ought to be made to defend this action in Colorado. It is clear that if a tort of defamation was committed, the publication element of that tort occurred here in Colorado, thus technically bringing this action within the reach of Colorado's long-arm statute, 1973 Colo. Rev. Stat. § 13-1-124 (1) (b). However, that statute cannot be read in a vacuum, and the due process clause requires certain "minimum contacts." *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

As established in *International Shoe,* insufficient contacts offend "traditional notions of fair play and substantial justice." *Id.* at 316. The standard is whether the De-

fendant could reasonably anticipate being haled into court in this forum. *Le Manufacture Francaise v. District Court,* 620 P.2d 1040 (1980), *citing, inter alia, Worldwide Volkswagen v. Woodson,* 444 U.S. 286 (1980). I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Further, I find that it is more reasonable in this action to quash service and dismiss the complaint because I cannot see that this action can continue in federal court. *Sykes v. Beal,* 392 F. Supp. 1089 (D. Conn. 1975). Moreover, even if it were to continue, I do not believe this is the proper forum. Courts generally consider, among other factors, the interest of the state in providing a forum for its residents and the convenience of the parties. As the Plaintiff is no longer even a Colorado resident, he can as easily bring whatever action he might have against Dr. Connolly in Nebraska. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted, and the complaint and cause of action are dismissed. Each party shall pay his or its own costs.

DATED at Denver, Colorado, this 1st day of October, 1982.

BY THE COURT:

/s/ John P. Moore,

Judge, United States District Court

APPENDIX C

(logo)

PRESBYTERIAN DENVER HOSPITAL
a division of Presbyterian/Saint Luke's Medical Center

1719 East 19th Avenue - Denver, Colorado 80218 -
(303) 839-6000

October 14, 1980

John T. Connolly, M.D.
Program Director
Department of Orthopedics
University of Nebraska Medical Center
42nd and Dewey Avenue
Omaha, Nebraska 68105

Dear Dr. Connolly:

Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc.

Your answer will be confidential.

Sincerely,

/s/ Michael A. Lubchenco, M.D.

Director of Medical Education

MAL:mfw

decision, reversed the District Court's dismissal of the case based on the Tenth Circuit's reading of this Court's decisions in *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 79 L.Ed. 2d 790 (1984) and *Calder v. Jones*, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984). Dismissal of the Board of Regents on Eleventh Amendment grounds was not appealed.

———o———

REASONS FOR GRANTING THE WRIT

I. The Decision Below Misapplied And Extended Keeton and Calder Beyond Their Constitutional Limits And Adopted A Talismanic Approach To The Personal Jurisdiction Question, Condemned in Burger King, Which Avoids A Minimum Contacts Analysis.

The decision below decided a significant question of federal law involving important public policy considerations in a manner flatly contradictory to prior decisions of this Court.

In its opinion, the Tenth Circuit Court of Appeals mechanically applied *Keeton* and *Calder* in an analytical vacuum to a situation constitutionally distant from their reasonably anticipated limits, totally ignoring the historically honored "minimum contacts" check on the reach of federal courts. If one who has a duty to respond to an out-of-state inquiry about an ex-student's performance in another state may be sued by the student in the forum of the recipient when the solicited communication constitutes the defendant's sole contact with the forum, then the protections of the Due Process Clause become mere gossamer illusions and the public's interest in the free exchange of candid opinions concerning a medical staff applicant's

prior academic and clinical performance chilled to the point of paralysis.

While purporting to follow the decisions in *Keeton* and *Calder*, the Court of Appeals held simply that:

> Taking Dr. Burt's allegations as true, as we must on a motion to dismiss [*but see, e.g., Land v. Dol'ar*, 330 U.S. 731, 735, n. 4 (1946)], we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim.

Opinion below at 245; Appendix A at App. 7.

Thus, taking *Keeton* and *Calder* as its cue, the Court of Appeals has adopted a simple mechanical test for deciding if personal jurisdiction may be exercised by the forum state in defamation cases: anywhere an alleged defamatory statement causes harm to the plaintiff, jurisdiction will lie against the defendant. The *Keeton* and *Calder* decisions cannot be read, however, to approve or condone the creation of such a rule for deciding personal jurisdiction issues.

Keeton, 104 S.Ct. 1473, 79 L.Ed. 2d 790 (1984), involved a suit by a New York resident against Hustler Magazine, Inc. in the State of New Hampshire. Although plaintiff had no contacts with the State of New Hampshire, and Hustler was not a New Hampshire citizen, in reliance upon the fact that Hustler Magazine regularly sold and circulated some 10,000 to 15,000 copies of its product in the State of New Hampshire each month, the Court concluded that sufficient minimum contacts existed to impose jurisdiction upon Hustler in that state, stating:

> Where, as in this case, respondent Hustler Magazine, Inc. has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.

Id., 79 L.Ed. 2d at 801-02.

Keeton thus relied exclusively on the regular, systematic, and extensive circulation of a national publication in the forum state to extend jurisdiction under New Hampshire's long-arm statute. *Keeton* is an example of a case in which "general", as opposed to "specific" jurisdiction in the forum state could be found based upon defendant's continuous and systematic activities within the forum state. *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174, 85 L.Ed. 2d 528, 541, n. 15 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 104 S.Ct. 1868, 80 L.Ed. 2d 404, 411 (1984); *compare Perkins v. Benguet Consolidated Mining Co.,* 341 U.S. 437 (1952) with *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957). *Keeton* represents no departure from or extension of cases such as *Perkins* which hold that a defendant who conducts continuous and systematic business in a state may be haled into court there. Such contacts are, however, totally absent here. The Court of Appeals' reliance upon *Keeton* was, therefore, misplaced.

To read *Calder,* 104 S.Ct. 1482, 79 L.Ed. 2d 804, as supporting the personal jurisdiction test that the Tenth Circuit has adopted for defamation cases ignores *Calder's* reliance on multiple connections between the forum state and the defendants' activities. Factual dissimilarities between *Calder* and this case prevent a finding that *Calder* is dispositive of this case. The Tenth Circuit's holding that *Calder* controls here abrogates the "minimum contacts" requirement of the Due Process Clause.

The *Calder* defendants were employees (reporter and editor) of *The National Enquirer,* a publication with a circulation in the forum state of 600,000 issues a week. The story was written for commercial purposes. It was drawn from forum state sources through telephone contacts and written about a resident of the forum state involving her activities in that state. *Calder,* 79 L.Ed. 2d at 812. In light of these facts, the Court concluded that "California [was] the focal point *both of the story and of the harm suffered.*" *Id.* (emphasis added).

The story in *Calder* was not in any fashion invited or solicited by the plaintiff, and the defendants' contacts with the forum state were not in any way the result of the unilateral activities of the plaintiff. The defendants purposefully availed themselves of an existing circulation apparatus and intended the story to be circulated to literally hundreds of thousands of forum state residents. The article was not in any way privileged or confidential.

Judge Seth's dissent to the opinion below points out that "we have only half the elements relied on by the Court in *Calder.*" Opinion below at 245; Appendix A at App. 7 (Seth, J. dissenting). Out of all of *Calder's* operative facts, the only similarity with this case is that here a letter concerning a Colorado resident was mailed into Colorado. That letter, however, did not rely on Colorado sources and did not concern the respondent's activities within Colorado. Rather, sources for statements in the letter, the respondent's academic record and the petitioner's perceptions of the respondent's performance, were entirely within Nebraska. The letter concerned only the activities of the respondent while he was in Nebraska.

In addition, petitioner did not seek out the respondent and hospitals to which he may have been applying for staff privileges, but only wrote his letter in response to inquiries from hospital officials. Those inquiries effectively originated with the respondent himself. As a University of Nebraska medical school department chairman, the petitioner has the duty to respond to such inquiries from responsible parties regarding the performance of his students wherever they may seek to practice medicine. Thus, the petitioner's sole contact with Colorado resulted from the unilateral decision of the respondent to apply for hospital privileges in that state and not from the purposeful actions of the petitioner.

In *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), this court rejected "any talismanic jurisdictional formulas," *id.,* 85 L.Ed. 2d at 549, and held that " 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " *Id. Burger King* went on to observe that "[t]he 'quality and nature' of an interstate transaction may sometimes be so 'random,' 'fortuitous,' or 'attenuated' that it cannot fairly be said that the potential defendant 'should reasonably anticipate being haled into court' in another jurisdiction." *Id.*

In applying *Calder* to the present case, the Tenth Circuit Court of Appeals failed to apply any minimum contacts analysis to insure that, even though an interstate transaction had taken place and even though some effect was felt within the State of Colorado, the "quality and nature" of the petitioner's contact with the State of Colorado was not "so random, fortuitous, or attenuated" that

he should "reasonably anticipate being haled into court" in the State of Colorado. *See and compare* decision below with *Fidelity & Casualty Co. of New York v. Philadelphia Resins Corp.*, No. 83-1362 (10th Cir. July 3, 1985).

Burger King established a two-step analysis for determining whether the exercise of long-arm jurisdiction offends " 'traditional conception[s] of fair play and substantial justice' embodied in the Due Process Clause of the Fourteenth Amendment" in a particular case. *Burger King*, 85 L.Ed. 2d at 535.

First, the Court must determine whether the defendant has "purposefully established 'minimum contacts' in the forum State" in order to ascertain whether jurisdiction may be imposed without violation of the Due Process Clause. *Id.*, 85 L.Ed. 2d at 542. If this inquiry is answered in the negative, then jurisdiction may not be allowed.

Second, if the "purposeful availment" requirement is satisfied, then a second tier of analysis requires determination of "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' " in the case at hand. *Id.*, 85 L.Ed. 2d at 543.

With regard to the first level of analysis, mere foreseeability of causing injury in the forum state "is not a 'sufficient benchmark' for exercising personal jurisdiction." *Id.*, 85 L.Ed. 2d at 542. Rather, " 'the foreseeability that is critical to the due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Id.*, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, at 297

(1980). This first level of analysis is designed to insure that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contact or of the "unilateral activity of another party or a third person." *Burger King,* 85 L.Ed. 2d at 542, quoting *Keeton,* 79 L.Ed. 2d at 797; *World-Wide Volkswagen Corp.,* at 299; and *Hall,* 80 L.Ed. 2d at 412.

This court has recognized that " 'some single or occasional acts' related to the forum may not be sufficient to establish jurisdiction if 'their nature and quality and the circumstances of their commission' create only an 'attenuated' affiliation with the forum." *Burger King,* 85 L.Ed. 2d at 543, n. 18; citing *International Shoe Co. v. Washington,* 326 U.S. 310, 318 (1945). The foreseeability of litigation in the forum is substantially diminished where the potential defendant's contact with the forum state consists only of an isolated act. *Burger King,* 85 L.Ed. 2d at 543, n. 18.

The Court of Appeals failed to analyze the "nature and quality" of the petitioner's contacts with the State of Colorado in order to find that petitioner *himself* created a "substantial connection" with the forum state. *Burger King,* 85 L.Ed. 2d at 542. As noted above, any connection with Colorado results not from the petitioner's activities or intent to do harm but from the respondent's decision to locate in Colorado which in turn resulted in routine inquiries into the respondent's background. In such a context there is no foreseeability of out-of-state litigation.

The impropriety of assertion of personal jurisdiction in forums chosen by the unilateral activity of another party has been recognized by this Court in many cases. In *World-Wide Volkswagen Corp.* this Court held that the Due

Process Clause forbids the exercise of personal jurisdiction over out-of-state automobile distributors and dealers whose only tie to the forum state resulted from a customer's decision to drive there. In *Kulko v. California Superior Court,* 436 U.S. 84 (1978), personal jurisdiction in the California courts could not be exercised over a divorced husband sued for child support payments whose only affiliation with the forum was created by his former spouse's decision to settle there. In *Hansen v. Denkla,* 357 U.S. 235 (1958), personal jurisdiction could not be exercised over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment in the forum state. In these cases, the defendants had no "clear notice that [they are] subject to suit" in the forum and no opportunity to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.,* 444 U.S. at 297; *see Burger King Corp. v. Rudzewicz,* 85 L.Ed. 2d at 542, n. 17.

In the present case, the unilateral activity of the respondent in deciding to locate in Colorado and apply for hospital privileges there resulted in inquiries to petitioner to which petitioner had a positive duty to respond. (Had the petitioner refused to respond in any way, he may even have been subject to suit by the respondent, but not in the State of Colorado, even under then Tenth Circuit's reading of *Keeton* and *Calder.*) Just as in the cases holding that

jurisdiction cannot be based on the unilateral activities of the plaintiff, petitioner here could not "structure [his] primary conduct with some minimum assurance as to where that conduct will and will not render [him] liable to suit." *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Here, the "nature and quality and the circumstances" of petitioner's sole contact with Colorado create only an attenuated affiliation with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). Under the Court of Appeals' ruling, the petitioner is effectively deemed to have appointed each of his students as his "agent for service of process" wherever they may decide to travel. *See World-Wide Volkswagen Corp.*, 444 U.S. at 296. Such a result does not comport with fair play and substantial justice.

II. Important Public Interest Questions Demand That This Court Review The Decision Below.

The respondent's completion of a residency program in orthopedic surgery does not by itself attest to his competency to practice in that specialty. It does not attest to the quality of work performed by the respondent beyond acknowledgment that the respondent's performance was not so bad as to cause dismissal from the residency program. Like any diploma or certificate of graduation, it does not distinguish those who finish an educational program with an "A" average from those whose average was "C minus" or "D". In short, a certificate of residency does not present a complete picture of the respondent's expe-

rience, qualifications, and competence without the comments of the respondent's instructors and supervisors.

To a very great degree, the medical profession is self-regulated and is charged with a public trust to prevent those from practicing who have not demonstrated competence, or indeed expertise, in the specialized field that they choose. In connection with the duty owed to the public, as well as with their own possible liability for negligence in granting staff privileges without diligent investigation of applicants' backgrounds, hospitals must make inquiry into the skills and competence of those who seek staff privileges. It was in this context that inquiry was made of petitioner regarding the respondent's performance as a resident in orthopedic surgery at the University of Nebraska. The petitioner's response resulted also from a duty to protect the public interest, and, indeed, from his duty to students such as the respondent to respond to inquiries from those who are considering giving employment to the petitioner's students, wherever they may be.

To expect the petitioner to defend suits in any state in which his students may desire to establish a practice because a response that a student's "performance was well below average" may be considered defamatory, not only does not comport with fairness and substantial justice but also has a chilling effect on the flow of information required for the protection of those who require competent, professional medical treatment.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that his petition for a writ of certiorari to the Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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DATED THIS 23RD DAY OF AUGUST, 1985.

APPENDIX A

Andrew K. BURT, Plaintiff-Appellant,

v.

The BOARD OF REGENTS OF the UNIVERSITY OF NEBRASKA and John F. Connolly, Defendants-Appellees.

No. 82-2378.

United States Court of Appeals, Tenth Circuit.

March 20, 1985.

Rehearing Denied June 17, 1985.

Reversed and remanded.

Seth, Circuit Judge, dissented and filed an opinion.

F. James Donnelly of Hannon, Stutz, Dyer & Miller, Denver, Colo. (Robert J. Dyer III, Denver, Colo., with him on the brief), for plaintiff-appellant.

Thomas L. Roberts of Pryor, Carney & Johnson, P.C., Englewood, Colo. (Susan T. Smith, Englewood, Colo., with him on the brief), for defendants-appellees.

Before SEYMOUR and SETH, Circuit Judges, and ANDERSON,* District Judge.

SEYMOUR, Circuit Judge.

Andrew K. Burt, a Colorado resident at the time this action was filed, brought suit against the Board of Regents of the University of Nebraska and John F. Con-

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* Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.

nolly, Chairman of the Department of Orthopedic Surgery at the University. Dr. Burt, a medical doctor, had completed a residency program in orthopedic surgery under Dr. Connolly at the University. Dr. Burt subsequently applied for staff privileges at several Colorado hospitals, which directed inquiries to Dr. Connolly about Dr. Burt's orthopedic residency and general medical competence. Dr. Connolly responded with a very unfavorable letter and Dr. Burt was denied staff privileges. Dr. Burt filed this suit seeking damages for defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty interests protected by the United States Constitution. The district court granted defendants' motions to dismiss, ruling that the Board of Regents was immune under the Eleventh Amendment, and that the court did not have personal jurisdiction over Dr. Connolly. Dr. Burt appeals the jurisdictional issue, and we reverse.[1]

Dr. Burt alleges in his complaint that the statements by Dr. Connolly were false, willful and wanton, made with malice, and published in Colorado. He further alleges that as a result of these statements he was unable to practice medicine in Colorado. Dr. Burt asserts that the court

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1. Dr. Burt does not appeal the district court's ruling that the Board was immune. As an alternative ground for affirming the dismissal as to him, Dr. Connolly urges on appeal that he also is immune under the Eleventh Amendment. In addition, he contends that Nebraska is a more convenient forum for this action. These issues were not the basis for the district court's disposition and we do not address them here. Dr. Connolly is of course free to present these arguments to the district court on remand.

has personal jurisdiction over Dr. Connolly pursuant to Colorado's long-arm statute,[2] which provides in pertinent part:

> "Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> . . . . .
>
> The commission of a tortious act within this state. . . ."

Colo.Rev.Stat. § 13-1-124(1) (b) (1973).

In response, Dr. Connolly filed an affidavit asserting that he is a resident of Nebraska and that he has never done business of any kind in Colorado. Dr. Connolly further states that he owns no property in Colorado and was never physically present in Colorado in connection with the claim asserted by Dr. Burt.

The Colorado long-arm statute was intended to extend the jurisdiction of the Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution. *Behagen v. Amateur Basketball Association of America*, 744 F.2d 731, 733 (10th Cir.1984). In this case the district court concluded that the action was technically within the reach of the long-arm statute because the alleged tort of defamation occurred in Colorado.[3] The court held, however, that personal jurisdiction

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2. In diversity cases, the federal district court's jurisdiction is co-extensive with that of the state courts. *See* Fed.R.Civ.P. 4(c).

3. "The tort of libel is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 1479, 79 L.Ed.2d 790 (1984) (citation omitted).

APPENDIX D

THE UNIVERSITY OF NEBRASKA MEDICAL CENTER
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Omaha, Nebraska 68105

Department of Orthodpaedic Surgery
and Rehabilitation
(402) 599-4287

John F. Connolly, M.D.
Chairman
Joel Adams, M.D.
Ed Simodynes, M.D.
Chief Residents

CHILDREN'S ORTHOPAEDICS
Walter W. Huurman, M.D.

FRACTURES AND ADULT
RECONSTRUCTIVE SURGERY
John F. Connolly, M.D.
O. Max Jardon, M.D.

HAND AND MICROVASCULAR
SURGERY
Robert M. Cochran, M.D.
Michael Whalen, P.A.C.

ORTHOPAEDIC RESEARCH
Louis Lippiello, Ph.D.
Dennis Chakkalakal, Ph.D.

SPORTS MEDICINE—ATHLETIC
INJURIES
W. Michael Walsh, M.D.
Guy Shelton, R.P.T., A.T.C.

Mrs. Elizabeth A. Tretter
Administrative Assistant

October 21, 1980

Michael A. Lubchenco, M.D.

Director of Medical Education
Presbyterian Denver Hospital
1719 East 19th Avenue
Denver, Colorado 80218

RE: Andrew Kelly Burt, M.D.

Dear Doctor Lubchenco:

In reply to your inquiry about Doctor Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Yours truly,

/s/ John F. Connolly, M.D.

Professor and Chairman

lat

The University of Nebraska-Lincoln The University of Nebraska at Omaha The University of Nebraska Medical Center

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-298

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

vs.

ANDREW K. BURT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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U.S. Const. amend. XIV, § 1 8

No. 85-298

In The
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vs.

ANDREW K. BURT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondent, Andrew K. Burt, respectfully requests that the Petition For Writ of Certiorari not be issued in order to review the judgment and opinion of the United States Court of Appeals For the Tenth Circuit entered in this proceeding on March 20, 1985. In the interests of brevity, clarity, and continuity of thought, Respondent is satisfied with the Petitioner's presentation

of the question presented for review, citations to the opinions in the Courts below, the statement of the grounds on which the jurisdiction of this Court is invoked, and the constitutional and statutory provisions which this case involves; and therefore, elects not to include the foregoing requirements within this Brief pursuant to U.S. Sup. Ct. Rule 34.2, 28 U.S.C.A.

—o—

STATEMENT OF THE CASE

Andrew K. Burt, the Respondent (Plaintiff below), is a medical doctor and a 1977 graduate of the Residency Program in Orthopaedic Surgery at the University of Nebraska Medical School. During Dr. Burt's entire residency, he never received one failing grade, an unsatisfactory report of any kind, or even any negative feedback about the adequacy of his work.

In 1980, upon moving to Colorado, Dr. Burt wished to start a practice in orthopaedic medicine. He applied for staff privileges at several Colorado hospitals. Dr. Burt, however, was summarily denied privileges in each case, thus being unable to set up his practice in orthopaedic surgery. The denial of privileges at these Colorado hospitals was due to a letter written on October 21, 1980 by Dr. John F. Connolly, Chairman of the Department of Orthopaedics at the University of Nebraska College of Medicine, the Petitioner herein. Said letter, included as Appendix D, was written to at least one Colorado hospital, and stated unequivocally that Dr. Burt was incapable of serving adequately within the field of Orthopaedic Sur-

gery. The letter was purposefully written with knowledge and intent that it would be published in Colorado and negatively influence those parties to which it was sent. It succeeded in grievously injuring Dr. Burt's career and impugning his professional reputation.

Respondent brought suit against the Board of Regents of the University of Nebraska and John F. Connolly in the District Court For the District of Colorado on claims of defamation, breach of contract, interference with prospective advantages and outrageous conduct. The District Court granted the Board of Regents' Motion to Dismiss, reasoning that it was immune under the Eleventh Amendment. In addition the Court held it had no personal jurisdiction over Dr. Connolly. Plaintiff appealed the jurisdictional issue, alone, against Dr. Connolly, to the United States Court of Appeals For The Tenth Circuit. The Tenth Circuit, reversing the District Court's ruling, distinguished the defamation found in *Calder v. Jones,* 104 S.Ct. 1482 (1984), by stating:

> [H]ere the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendant's conduct and its calculated injurious effect on the forum state.

Opinion below at 245; Appendix A at App. 6.

Thus, the Court of Appeals relied on this Court's decisions in *Keeton v. Hustler Magazine, Inc.,* 104 S.Ct. 1473 (1984) and *Calder v. Jones,* 104 S.Ct. 1482 (1984), by carefully examining the facts and the nature of the harm in-

flicted, thus arriving at a just and fair decision in harmony with the constitutional fairness standards of the Due Process Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

In order to examine whether the Federal District Court had *in personam* jurisdiction over Defendant, Dr. John F. Connolly, this Court must first look to whether jurisdiction is authorized by Colorado law. It was conceded by Defendant in his Brief below and stated by that Court in its Order that Dr. Connolly was within the reach of Colorado's long-arm statute, C.R.S. § 13-1-124 (1973). The only other inquiry before this Court regarding jurisdiction is whether an application of C.R.S. § 13-1-124 (1973) over Dr. Connolly is a violation of the Due Process Clause of the Fourteenth Amendment. Drawing from the recent cases of *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984) and *Calder v. Jones*, 104 S.Ct. 1482 (1984), it is clear that individuals who purposefully and intentionally inflict injury within the forum state will be subject to prosecution in that state even if physical contacts with that forum are indeed at a minimum. Dr. Connolly is clearly within the constitutional reach of the Colorado Courts. When Dr. Connolly wrote the defamatory letter addressed to a Colorado hospital, he knew that he would be libeling Respondent in the State of Colorado and furthermore knew that he was causing important consequences within this State.

REASONS FOR OPPOSING THE ISSUANCE OF THE WRIT

I. The Facts in the Instant Action Indicate that Petitioner Has Failed to Satisfy All of the Criteria Necessary to Subject a Non-Resident to the Personal Jurisdiction of the Federal Courts in Colorado.

International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny provide a solid analytical foundation upon which every personal jurisdiction claim may be determined. Thus, in the instant action, the opinion of the United States Court of Appeals For The Tenth Circuit and the recent decisions of *Keeton* and *Calder* weigh heavily in favor of bringing Dr. Connolly, the Petitioner herein, within the ambit of Colorado's long-arm statute and the due process requirements of the Fourteenth Amendment of the United States Constitution.

It is universally accepted that two criteria must be satisfied before a state statute can confer jurisdiction over a non-resident defendant. First, the Court must determine if the defendant is amenable to service under the long-arm statute of the forum State. Second, the exercise of personal jurisdiction over the non-resident must comport with the Due Process Clause of the Fourteenth Amendment. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

Regarding the initial requirement, actions of the Petitioner clearly come within the purview of Colorado's long-arm statute, C.R.S. § 13-1-124(1)(b) (1973), which provides that a non-resident is subject to the jurisdiction of the Colorado courts on any claim arising from the "[c]ommission of a tortious act within this state." In fact, the Court of Appeals, the District Court, and Peti-

tioner himself, in his Memorandum ~~in~~ Support of Motion to Dismiss, acknowledged that jurisdiction over Dr. Connolly is in accordance with the language of C.R.S. § 13-1-124. *See,* Brief of Appellee at 13, *Burt v. Board of Regents of University of Nebraska,* 757 F.2d 242 (10th Cir. 1985).

Thus the inquiry is reduced solely to the issue of whether the assertion of jurisdiction over the Petitioner is constitutionally within federal court interprtations of the Due Process Clause of the Fourteenth Amendment.

Initially one must note that the Petitioner neglected to recognize basic tenets upon which the exercise of personal jurisdiction is based. For instance, it is well settled that the commission of a tort within a state includes extra-territorial acts that produce actionable consequences within the forum. The seminal case of *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961) is often credited with extending personal jurisdiction over out-of-state actors who cause tortious consequences within a forum State. In *Gray,* jurisdiction was upheld over a foreign corporation that had no agents in Illinois, transacted no business in Illinois, maintained no office in Illinois and sold no products in Illinois. The defendant had manufactured a safety valve in Ohio, which was used in a water heater made in Pennsylvania and purchased by the plaintiff in Illinois. The safety valve was defective, causing the water heater to explode, injuring the plaintiff. The fact that defendant expected at least some of the valves would be used in Illinois was sufficient to require the corporation to defend in that State.

The Colorado Courts are especially willing to find jurisdiction proper over nonresident defendants who pur-

posefully commit tortious acts within the State. *Ruggieri v. General Well Services, Inc.*, 535 F.Supp. 525 (D.Colo. 1982). In *Jenner & Block v. District Court*, 197 Colo. 184, 590 P.2d 964 (1979), Judge Carrigan, speaking for the Court, stated:

> Allegations that a defendant's acts in another State ultimately caused injury in Colorado, and thus constituted a tort here, suffice as a prima facie showing of the threshold jurisdiction. (citations omitted) The non-resident tortfeasor need have no additional contacts in this State to satisfy due process requirements. (at p. 966)

Id. at 185, 590 P.2d 966 (1979).

If Dr. Connolly had struck a physical blow upon a Colorado resident there would be no question of his amenability to prosecution within the Colorado Courts. There appears no distinction between the physical actions stated above and the malicious and purposeful actions of Dr. Connolly, which in effect constituted a blow to Dr. Burt's reputation and career. It should be noted that the purposeful nature of Dr. Connolly's actions is the conduit to jurisdiction in Colorado. Thus, an inquiry as to whether Dr. Connolly does any business within Colorado strays from the relevant issue in this case.

Petitioner would have this Court believe that the Court of Appeals adopted a "misplaced reliance" on *Keeton* and *Calder* in reaching its decision below. In *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984), a New York resident sued Hustler Magazine, Inc., an Ohio corporation, with its principal place of business in California, in the United States District Court for the District of New Hampshire, alleging the tort of libel in her complaint.

More specifically, Keeton claimed she was libeled in five separate issues of defendant's magazine of which some 10 to 15,000 copies reached the forum State each month. This Court, in reversing the decision of the lower courts, held that the defendant's commission of a tort within New Hampshire satisfied the jurisdictional requirements of both the New Hampshire long-arm statute and the minimum contacts required under the Due Process Clause. U.S. Const. amend. XIV § 1. Petitioner asserts that *Keeton* "*relied exclusively* on the regular systematic and extensive circulation of a national publication in the forum State to extend jurisdiction under New Hampshire's long-arm statute." Petition For Writ of Certiorari at 8, *Connolly v. Burt* (August 22, 1985 No. 85-298) (emphasis added). However, more significantly, Petitioner apparently failed to consider the element of intentional conduct, that pervades the actions of the nonresident defendants in both *Keeton* and *Calder*. The Court in *Keeton* did not necessarily rely on the fact that the defendant magazine sold some 10 to 15,000 copies of its magazines per month in New Hampshire. Rather, the Court's emphasis on the intentional infliction of injury through the magazine's distribution, which could in no way be characterized as "random," "isolated," or "fortuitous" stands as paramount in *Keeton*. *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 1478 (1984). The parallel to the instant case should be self-evident.

Additionally, Petitioner's attempt to distinguish *Calder v. Jones*, 104 S.Ct. 1482 (1984) must also fail. *Calder* involved a suit brought by a professional entertainer, Shirley Jones, in the California Superior Court alleging she had been libeled in an article written and edited by

the defendants, and published in The National Enquirer, a national publication. The California Court of Appeals reversed the Superior Court's decision to quash service of process for lack of jurisdiction. This Court affirmed, holding that jurisdiction is proper where defendants intended to and did cause tortious injury in California. Justice Rehnquist, writing for the Court in *Calder v. Jones,* 104 S.Ct. 1482 (1984), stated:

> Petitioners (magazine editor and writer) are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California . . . an article they knew would have a potentially devasting impact upon Respondent. And they knew that the brunt of the injury would be felt by respondent in the State in which she lives and works . . . .

Id. at 1487.

Again, the similarity to the instant action is clear. Dr. Connolly was the primary participant in a wrongdoing intentionally directed at a Colorado resident, impugning the professional reputation of a doctor whose career was then centered in Colorado.

Secondly, Petitioner misperceives the import of the quote in *Calder,* relied upon in Judge Seth's dissent to the opinion below, that "California is the focal point of the story and of the harm suffered." *Calder v. Jones,* 104 S.Ct. 1482, 1487 (1984). Although Petitioner agrees that the "harm suffered" may have occurred in Colorado, he overemphasizes the significance of the "focal point of the story." Petitioner may have sent the letter from Nebraska, but he did not rely upon information received in Nebraska. Indeed Petitioner relied on his own personal

bias. The true focal points of the story were therefore the recipients of the letter those individuals in Colorado who were thereby influenced and refused to grant staff privileges to Dr. Burt.

Thirdly, Petitioner's reliance on *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174 (1985), is somewhat incongruous. In *Burger King* this Court actually extended personal jurisdiction over an "out of state" actor in a franchise dispute. *Burger King* emphasized the "purposeful availment" requirement which "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random', 'fortuitous,' or 'attenuated' contacts." *Burger King v. Rudzewicz,* 105 S.Ct. at 2183. It is perplexing to surmise, however, that a letter purposefully aimed at specific hospitals in Colorado is a random, fortuitous or attenuated event, as Petitioner suggests. Dr. Connolly, by deliberately and proximately causing the commission of a tort in Colorado, has purposefully availed himself of the "benefits and protections" of Colorado law. Likewise, the "quality and nature" of Petitioner's relationship in Colorado can, in no sense, be viewed as random, fortuitous and attenuated. By eschewing a simple disclosure of facts, as requested by the hospital considering Dr. Burt's application for staff privileges, and dealing an intentional, malicious blow to Respondent's professional competency and personal integrity, Petitioner invited the extension of Colorado's long-arm statute to include himself.

Moreover, the Court in *Burger King* lists "considerations" which "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*

Corp. v. Rudzewicz, 105 S.Ct. at 2184, (1985). These factors include, *inter alia,* "the forum State's interest in adjudicating the dispute," "plaintiff's interest in obtaining convenient and effective relief," and the "shared interest of the several States in furthering fundamental social policies." *Burger King Corp. v. Rudzewicz,* 105 S.Ct. at 2184.

In the instant action, it is beyond dispute that Colorado has a significant interest in redressing injuries that occur within the State. As stated by Justice Rehnquist,

> A State has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a State seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Keeton v. Hustler Magazine, Inc., 104 S.Ct. 1473, 1479 (1984) (quoting Restatement (Second) of Conflict of Laws § 36 comment e (1972)).

Keeton is particularly instructive in balancing the competing factors which influence minimum contracts inquiry. For instance, the Court held that:

> [T]he reputation of the libel victim may suffer harm even in a State in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where plaintiff's previous reputation was, however small, at least unblemished.

Keeton v. Hustler Magazine, Inc., 104 S.Ct. at 1479.

The Court also noted New Hampshire's "substantial interest in cooperating with other States" in order to "efficiently [litigate] all issues and damage claims arising out of libel, in a unitary proceeding." *Keeton,* 104 S.Ct.

at 1480. Surely, Colorado must have a "manifest interest in providing effective means of redress for its residents." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957).

Furthermore, since the injury was felt entirely by a Colorado resident, forcing Respondent to travel to Nebraska would not advance Plaintiff's "interest in obtaining convenient and effective relief." All of the witnesses to the *effect* of the letter reside in Colorado. The witnesses likely to be called at trial, those individuals possessing knowledge and information with regard to the content of the letter, are in Colorado. *See Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 334 (5th Cir. 1982) (personal jurisdiction predicated on one long distance phone call constituting a tort within the forum State). Lastly, Petitioner has failed to show how the exercise of jurisdiction in Colorado contravenes Nebraska's "fundamental substantive social policies."

In conclusion, Petitioner's bald assertion that the Court of Appeals applied a "talismanic jurisdictional formula" is simply peradventure. The facts of the instant action, when laid bare, indicate that Petitioner has "certain minimum contacts" with Colorado through commission of a tort within this forum. The Court of Appeals, in examing the facts of this case, decided that extension of personal jurisdiction comports with fair play and substantial justice; therefore, this interpretation of the minimum contacts doctrine should stand as a just and proper resolution of the inquiry.

II. The Petition For Writ of Certiorari Disregards the Intentional Conduct of the Petitioner.

Petitioner reasons that the extension of jurisdiction over an out-of-state doctor would result in the chilling effect of making a doctor eligible for litigation anywhere in the world, or alternatively create a flood of incompetent doctors within this nation's hospitals. Therefore, Petitioner urges the prophylactic measure of rejecting jurisdiction in this case.

Petitioner in alleging these policy "considerations," grossly misperceives the pertinent facts of this case. Dr. Burt, as his uncontroverted Affidavit filed in this matter establishes, studied directly under Dr. Connolly at the University of Nebraska, passed all of Dr. Connolly's courses, never received any negative comments concerning his performance, and graduated with a Certificate of Residency signed by Dr. Connolly himself. On the other hand, the letter written by Dr. Connolly does not merely describe Dr. Burt as "below average," but unequivocably states that Dr. Burt could not serve adequately in the field of orthopaedic surgery. The fact that Petitioner persists in fueling fears of pervasive incompetency within the medical profession only aids in diverting the attention of the Court from the critical issues of this case, the intentional and malicious conduct of Dr. Connolly. It is indisputable that Dr. Connolly, an experienced orthopaedic surgeon, knew that his letter of October 21, 1980 would ruin the career and professional reputation of Dr. Burt, a career which Dr. Connolly had formerly sanctioned. In effect, the letter revoked Dr. Burt's license to practice orthopaedic surgery, without notice to Dr. Burt, or the right to be heard, and thus, without affording Dr. Burt minimal due process.

The Petition For Writ of Certiorari noticeably avoids mention of the malicious nature of Dr. Connolly's actions. Dr. Connolly did not merely comment on Dr. Burt's medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc., as requested, rather, he leaped across the line between criticism and defamation, by purposefully writing a defamatory letter regarding Dr. Burt's total incompetency as an orthopaedic surgeon. Connolly knew that this letter was untrue, he knew that the letter would create a stigma on Dr. Burt's professional reputation and he knew the letter would ruin Dr. Burt's career. Obviously, the letter of Dr. Connolly manifests a personal vendetta against Dr. Burt and subverts the true purpose of a request for recommendation in the medical profession. Rather than placing a chill upon responses for requests for recommendation, a finding in favor of Dr. Connolly would grant those in powerful positions a license to defame former students. Indeed, that license is exactly what Dr. Connolly requests this Court sanction.

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CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition For Writ of Certiorari to the Court of Appeals for the Tenth Circuit not be granted.

Respectively submitted,

STUTZ, DYER, MILLER and DELAP
F. JAMES DONNELLY
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DATED THIS 1st DAY OF NOVEMBER, 1985.

APPENDIX A

Andrew K. BURT, Plaintiff-Appellant,

v.

The BOARD OF REGENTS OF the UNIVERSITY OF NEBRASKA and John F. Connolly, Defendants-Appellees.

No. 82-2378.

United States Court of Appeals, Tenth Circuit.

March 20, 1985.

Rehearing Denied June 17, 1985.

Reversed and remanded.

Seth, Circuit Judge, dissented and filed an opinion.

F. James Donnelly of Hannon, Stutz, Dyer & Miller, Denver, Colo. (Robert J. Dyer III, Denver, Colo., with him on the brief), for plaintiff-appellant.

Thomas L. Roberts of Pryor, Carney & Johnson, P.C., Englewood, Colo. (Susan T. Smith, Englewood, Colo., with him on the brief), for defendants-appellees.

Before SEYMOUR and SETH, Circuit Judges, and ANDERSON,* District Judge.

SEYMOUR, Circuit Judge.

Andrew K. Burt, a Colorado resident at the time this action was filed, brought suit against the Board of Regents of the University of Nebraska and John F. Con-

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* Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.

nolly, Chairman of the Department of Orthopedic Surgery at the University. Dr. Burt, a medical doctor, had completed a residency program in orthopedic surgery under Dr. Connolly at the University. Dr. Burt subsequently applied for staff privileges at several Colorado hospitals, which directed inquiries to Dr. Connolly about Dr. Burt's orthopedic residency and general medical competence. Dr. Connolly responded with a very unfavorable letter and Dr. Burt was denied staff privileges. Dr. Burt filed this suit seeking damages for defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty interests protected by the United States Constitution. The district court granted defendants' motions to dismiss, ruling that the Board of Regents was immune under the Eleventh Amendment, and that the court did not have personal jurisdiction over Dr. Connolly. Dr. Burt appeals the jurisdictional issue, and we reverse.[1]

Dr. Burt alleges in his complaint that the statements by Dr. Connolly were false, willful and wanton, made with malice, and published in Colorado. He further alleges that as a result of these statements he was unable to practice medicine in Colorado. Dr. Burt asserts that the court

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1. Dr. Burt does not appeal the district court's ruling that the Board was immune. As an alternative ground for affirming the dismissal as to him, Dr. Connolly urges on appeal that he also is immune under the Eleventh Amendment. In addition, he contends that Nebraska is a more convenient forum for this action. These issues were not the basis for the district court's disposition and we do not address them here. Dr. Connolly is of course free to present these arguments to the district court on remand.

has personal jurisdiction over Dr. Connolly pursuant to Colorado's long-arm statute,[2] which provides in pertinent part:

> "Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> . . . . .
>
> The commission of a tortious act within this state. . . ."

Colo.Rev.Stat. § 13-1-124(1) (b) (1973).

In response, Dr. Connolly filed an affidavit asserting that he is a resident of Nebraska and that he has never done business of any kind in Colorado. Dr. Connolly further states that he owns no property in Colorado and was never physically present in Colorado in connection with the claim asserted by Dr. Burt.

The Colorado long-arm statute was intended to extend the jurisdiction of the Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution. *Behagen v. Amateur Basketball Association of America,* 744 F.2d 731, 733 (10th Cir.1984). In this case the district court concluded that the action was technically within the reach of the long-arm statute because the alleged tort of defamation occurred in Colo-

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2. In diversity cases, the federal district court's jurisdiction is co-extensive with that of the state courts. See Fed.R.Civ.P. 4(c).

rado.[3] The court held, however, that personal jurisdiction over Dr. Connolly was precluded by the requirements of federal due process because he lacked sufficient minimum contacts with the forum state.

Subsequent to the district court's decision below, the Supreme Court decided *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), and *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). We believe these two cases require us to reverse the district court's conclusion in this case.

The Court in both *Keeton* and *Calder* recognized that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton*, 104 S.Ct. at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)); *Calder*, 104 S.Ct. at 1486 (same). The plaintiff in *Keeton*, a New York resident, brought a libel action in New Hampshire against Hustler Magazine, an Ohio corporation with its principal place of business in California. The only connection between either the plaintiff or the magazine and New Hampshire was the sale in that state of the allegedly libelous material. In upholding personal jurisdiction, the Court agreed "that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." 104 S.Ct. at 1479. The Court then concluded:

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3. "The tort of libel is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 1479, 79 L.Ed.2d 790 (1984) (citation omitted).

> "'"A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."' *Leeper v. Leeper,* 114 N.H. 294, 298, 319 A.2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36, Comment e (1971).
>
> This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."

Id. Under *Keeton,* Colorado has a significant interest in the present case.

In *Calder,* a California resident brought a libel suit in California state court against, inter alia, two employees of a national magazine who were residents of Florida and who had prepared the alleged libelous magazine article in Florida. The California Court of Appeals held that personal jurisdiction over the Florida residents was proper. The Supreme Court noted:

> "[T]he [California] court concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."

Calder, 104 S.Ct. at 1485-6 (footnote omitted). The Supreme Court affirmed, approving the "effects" test em-

ployed by the California court. *See id.* at 1486 n. 6. The Court concluded that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California," *id.* at 1487, and held that "jurisdiction over [the Florida residents] in California is proper because of their intentional conduct in Florida calculated to cause injury to [the plaintiff] in California," *id.* at 1488.

We believe this analysis is dispositive of the jurisdictional issue in this case. Although the libel in *Calder* was pursuant to a commercial enterprise, whereas here the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state. The Court in *Calder* was unpersuaded by the arguments of the defendant reporter and the defendant editor that they personally had no economic stake in their employer's sales in a distant state.

> "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works. . . ."

Id. at 1487.

Nor are we persuaded by Dr. Connolly's claim that it violates due process to hale him into court in Colo-

rado because the letter was, in effect, solicited by Dr. Burt, who gave Dr. Connolly's name to the hospitals. Dr. Burt solicited a letter of reference; he did not solicit a malicious falsehood. Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim. To the extent that Dr. Connolly's statements damaged Dr. Burt's reputation and his ability to practice his profession, the damage occurred in Colorado.

Accordingly, we conclude that the district court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment is reversed on that ground and remanded for further proceedings.

SETH, Circuit Judge, dissenting:

I must respectfully dissent.

The majority relies entirely on *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804, but in my view we have only half the elements relied on by the Court in *Calder*. There, the opinion places emphasis on the fact that the story concerned what the plaintiff did in California. Thus: "The allegedly libelous story concerned the California activities of a California resident." The Court also stated that the "article was drawn from California sources." The Court then stated the two elements:

> "In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 [100 S.Ct. 559, 62 L.Ed.2d 490]. . . ."

The Court so applies the "effects" theory where both "the focal point . . . of the story and of the harm" was in California.

In the case before us the letter was, of course, sent to Colorado but the "focal" point of the story was Nebraska. The letter was about what had taken place in Nebraska not Colorado. The story was certainly not drawn from Colorado sources. The action was initiated by plaintiff. We thus have but half a *Calder*. The opinion in *Calder* quotes and relies on the usual minimum contact cases with no comment or criticism. It states at the outset of the opinion of the defendant:

> "It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California."

The Court in a footnote quoted the exact circulation figures for the issue, 5,292,200 total and 604,431 in California. The Court had stated at the outset that:

> "The article was published in a national magazine with a large circulation in California."

The opinion contains a mixture of the minimum contact facts, minimum contact cases, and the "effects" theory. Thus it should be assumed that the "effects" basis referred to by the Court is operative in the context of the minimum contacts doctrine as pressed in the case therein quoted, *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559. Thus "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *See also* our cases such as *Premier Corp. v. Newsom,*

620 F.2d 219 (10th Cir.), and *Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.), where in a specific jurisdiction case we required the minimum contact. *See also* the unilateral activity case, *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado. *See also Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.).

Again, the "story" was about what had taken place in Nebraska not Colorado. The *only* connection or contact the defendant had with Colorado was the letter he sent to the Colorado hospital in response to its request that he express an opinion as to the plaintiff's "medical knowledge, technical proficiency," and other qualifications. The plaintiff acknowledges that defendant had a duty to reply and that the hospital solicited the information. It is apparent that this solicitation can also be attributed to the plaintiff.

Again, the letter in issue was a required answer to the inquiry as to Dr. Burt's performance as an orthopedic resident in Nebraska, thus was not unsolicited or gratuitously made. Instead, the action was initiated by plaintiff. The majority opinion at page 245 quotes from *Calder* (104 S.Ct. 1482, at 1487), as to the brunt of the injury and impact on respondent. However, the sentence quoted in part continued with "and in which the *National Enquirer* has its largest circulation." The Court then continued:

> "Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article."

"Under these circumstances" thus includes the extent of the circulation in California and thus the contacts of defendants. The traditional cases were quoted following the above quotation. Again, we have the "contact" ingredient or element of what the Court calls the "impact." It is an impact theory but in a minimum contact context.

The trial court in its evaluation of the facts found that there was no factual basis for *in personam* jurisdiction over the plaintiff. It must be assumed that this included all the elements and thus a determination that the defendant could not anticipate being haled into court in Colorado. The trial court's findings are presumed to be correct. The jurisdictional issue requires and is based on an evaluation of the facts.

Keeton v. Hustler Magazine, Inc., — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790, was decided on the same day as was *Calder*. The contacts aspect was treated at some length. The Court referred to the regular monthly sales of thousands of magazines in New Hampshire and said this "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." Thus there were sufficient "minimum contacts" between defendant and the State to meet due process requirements, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559. The Court in *Keeton* was concerned with the relationship of the plaintiff to the forum State and the First Amendment issue. However, on the contacts element the Court said of the magazine:

> "But respondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises

> out of the very activity being conducted, in part, in New Hampshire."

The Court said also that the harm was done in New Hampshire and there is "no justification" for restricting libel actions to defendant's forum, and:

> "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463 [61 S.Ct. 339, 342, 85 L.Ed. 278].'"

(The Court there quoted *International Shoe.)*

Thus the Court in *Keeton* in what appears to be a specific jurisdictional case or impact case includes the minimum contact doctrine. Again, we must assume that the "impact" theory is appropriate when found in the context of minimum contacts.

As the Court did in *Calder* and *Keeton,* and in our earlier cases, the contacts of the plaintiff with the forum State must be examined. This was again emphasized by the majority and the dissent in *Helicopteros Nacionales de Colombia v. Hall,* — U.S. —, 104 S.Ct. 1868, 80 L.Ed.2d 404, which followed *Keeton* and *Calder.*

In a challenge to *in personam* jurisdiction the plaintiff has the burden of showing the basis for jurisdiction. This is not a heavy burden, but reliance cannot be placed on unsupported allegations in the complaint. These allegations are not taken as true under these circumstances in view of the burden.

In 2 Moore's Federal Practice ¶ 4.41-1[3], at 4-473 (2d ed.), the authors state:

> "On appeal, the trial court's findings on the jurisdictional question are presumptively correct and will be set aside only if clearly erroneous. Even where the trial court reached its decision on the basis of affidavits and other documentary evidence, and did not weigh conflicting evidence or evaluate witness credibility, the standard of review on appeal is the same. The court on appeal will not draw its own inferences and conclusions from the facts in the record."

A footnote quotes our *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir.).

The trial judge's evaluation of the facts developed by the affidavits should be considered as any other fact determination. The weighing of the facts is necessary in the determination of jurisdiction. *Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132.

I would affirm the judgment of the trial court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

ANDREW K. BURT,

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed October 1, 1982)

This case is before me upon motions to quash service and dismiss. The action has been commenced by a doctor presently domiciled in the state of California against the Regents of the University of Nebraska and a professor on the University of Nebraska faculty, who is also chairman of the Department of Orthopedic Surgery. The basis for the action is a letter written by Dr. Connolly, the professor, to the Director of Medical Education at Denver's Presbyterian Hospital.

Dr. Connolly's letter states that the Plaintiff has "not been recommended for Board eligibility." It is Plaintiff's theory that publication of this letter results in defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty rights protected by the federal constitution.

Defendants seek dismissal of the complaint upon grounds of immunity and upon lack of *in personam* jurisdiction. The Regents claim to be an agency of the state of Nebraska protected by the eleventh amendment. Dr. Connolly claims the same immunity, stating he was acting, in this case, as the state's alter ego. Both Defendants further claim their minimal contacts with the state of Colorado render suit in this district an impediment to their due process rights.

Plaintiff counters these arguments first by claiming he would be without redress if the eleventh amendment were applied. He further argues Nebraska law would deny his right to sue these Defendants on his defamation claims.[1]

It seems clear to me, first, that whether the Regents are an agency of the state of Nebraska is principally dependent upon the state law. *Hamilton Mfg. Co. v. Trustees of State Colleges,* 356 F.2d 599 (10th Cir. 1966). Since the question of whether the Regents are an agency of the state of Nebraska has been answered affirmatively, *Catania v. University of Nebraska,* 282 N.W.2d 27 (Neb. 1979), the only remaining question as far as the Regents are concerned is whether the eleventh amendment immunity applies in all respects to the claims raised against them here. That question also must be answered affirmatively. *United Carolina Bank v. Regents Stephen F. Austin State University, et al.,* 665 F.2d 553 (5th Cir. 1982); *Lecompt v. University of Houston System, et al.,* 535 F. Supp. 317 (S.D. Tex. 1982); *Harris v. Arizona Board of Regents, et*

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[1]Neither ground appears to me to be a valid basis for extending jurisdiction. *See United Carolina Bank v. Regents,* 655 F.2d 553 (5th Cir. 1982).

al., 528 F. Supp. 987 (D. Ariz. 1981); *Beckley v. University of Maryland, et al.,* 527 F. Supp. 174 (D. Md. 1981). It is thus evident the Defendant Regents are immune to this action, and the complaint against them must be dismissed.

As far as Dr. Connolly is concerned, I am loath at this moment to say he is vested with eleventh amendment immunity for the simple reason the amended complaint cannot be read only as the Defendant suggests. Taking the averments pertinent to Dr. Connolly in a light most favorable to the Plaintiff, I must conclude there are indications that recovery is sought against Dr. Connolly for his individual acts that would not be in the scope of his acting as and for the state. Hence, were he otherwise subject to unqualified immunity as the state's alter ego, there is a sufficient claim against Dr. Connolly to get the Plaintiff past the eleventh amendment. Nothwithstanding, the complaint against him should be dismissed for other reasons

Dr. Connolly has moved to dismiss on Rule 12 (b) (4) and (5) grounds. I believe the motion leads to the question of whether the case should be dismissed for lack of *in personam* jurisdiction. *Federal National Bank & Trust Co. v. Moon,* 412 F. Supp. 644 (D. Okla. 1976).

In this case I have considered whether Dr. Connolly ought to be made to defend this action in Colorado. It is clear that if a tort of defamation was committed, the publication element of that tort occurred here in Colorado, thus technically bringing this action within the reach of Colorado's long-arm statute, 1973 Colo. Rev. Stat. § 13-1-124 (1) (b). However, that statute cannot be read in a vacuum, and the due process clause requires certain "min-

imum contacts." *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

As established in *International Shoe,* insufficient contacts offend "traditional notions of fair play and substantial justice." *Id.* at 316. The standard is whether the Defendant could reasonably anticipate being haled into court in this forum. *Le Manufacture Francaise v. District Court,* 620 P.2d 1040 (1980), *citing, inter alia, Worldwide Volkswagen v. Woodson,* 444 U.S. 286 (1980). I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Further, I find that is is more reasonable in this action to quash service and dismiss the complaint because I cannot see that this action can continue in federal court. *Sykes v. Beal,* 392 F. Supp. 1089 (D. Conn. 1975). Moreover, even if it were to continue, I do not believe this is the proper forum. Courts generally consider, among other factors, the interest of the state in providing a forum for its residents and the convenience of the parties. As the Plaintiff is no longer even a Colorado resident, he can as easily bring whatever action he might have against Dr. Connolly in Nebraska. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted, and the complaint and cause of action are dismissed. Each party shall pay his or its own costs.

DATED at Denver, Colorado, this 1st day of October, 1982.

BY THE COURT:
/s/ John P. Moore,
Judge, United States District Court

APPENDIX C

(logo)

PRESBYTERIAN DENVER HOSPITAL
a division of Presbyterian/Saint Luke's Medical Center

1719 East 19th Avenue - Denver, Colorado 80218 -
(303) 839-6000

October 14, 1980

John T. Connolly, M.D.
Program Director
Department of Orthopedics
University of Nebraska Medical Center
42nd and Dewey Avenue
Omaha, Nebraska 68105

Dear Dr. Connolly:

Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc.

Your answer will be confidential.

Sincerely,

/s/ Michael A. Lubchenco, M.D.

Director of Medical Education

MAL:mfw

APPENDIX D

THE UNIVERSITY OF
NEBRASKA MEDICAL CENTER
42nd and Dewey Avenue
Omaha, Nebraska 68105

Department of Orthodpaedic Surgery
and Rehabilitation
(402) 599-4287

John F. Connolly, M.D.
Chairman
Joel Adams, M.D.
Ed Simodynes, M.D.
Chief Residents

CHILDREN'S ORTHOPAEDICS
Walter W. Huurman, M.D.

FRACTURES AND ADULT
RECONSTRUCTIVE SURGERY
John F. Connolly, M.D.
O. Max Jardon, M.D.

HAND AND MICROVASCULAR
SURGERY
Robert M. Cochran, M.D.
Michael Whalen, P.A.C.

ORTHOPAEDIC RESEARCH
Louis Lippiello, Ph.D.
Dennis Chakkalakal, Ph.D.

SPORTS MEDICINE—ATHLETIC
INJRIES
W. Michael Walsh, M.D.
Guy Shelton, R.P.T., A.T.C.

Mrs. Elizabeth A. Tretter
Administrative Assistant

October 21, 1980
Michael A. Lubchenco, M.D.

Director of Medical Education
Presbyterian Denver Hospital
1719 East 19th Avenue
Denver, Colorado 80218

RE: Andrew Kelly Burt, M.D.

Dear Doctor Lubchenco:

In reply to your inquiry about Doctor Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Yours truly,

/s/ John F. Connolly, M.D.

Professor and Chairman

lat

Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-298

In The

Supreme Court of the United States

October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

v.

ANDREW K. BURT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUG. 22, 1985
CERTIORARI GRANTED DEC. 2, 1985

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RELEVANT DOCKET ENTRIES
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DATE	PROCEEDINGS
1981	
10/20	COMPLAINT—pd Issued summons
12/11	MOTION to Quash Service of Process and to Dismiss this action for lack of subject Matter and in Personam Jurisdiction, Improper Venue, Insufficiency of Process and Service of Process and for Failure to State a Claim Upon which Relief can be granted . . . by Deft's. The Board of Regents of the University of Nebraska & John F. Connolly . . . COM
12/20	Memo in Support of Def Motion to Dismiss . . . COM Affidavit of Mr. Connolly
1982	
2/ 1	Brief in Opposition to Deft's. Motion to Dismiss . . . by Plft . . . COM
3/ 5	Deft's. Reply Brief in Support of Deft's. Motion to Dismiss . . . COM
6/28	MOTION to File Amended Claim . . . by Plft. AMENDED COMPLAINT . . . by Plft . . . COS (TENDERED)
7/ 1	MINUTE ORDER (SGF) . . . Plft's. Motion to Amend Complaint is GRANTED . . . The Clerk of Court is directed to file the tendered Amended Complaint, forthwith . . . COM . . . 7/2/82 AMENDED COMPLAINT . . . by Plft . . . COS
7/28	MOTION to Dismiss Plft's. Amended Complaint for Failure to State a claim upon which Relief can be Granted . . . by Deft's . . . COM Memorandum Brief In Support of Deft's. Mo-

tion to Dismiss Plft's. Amended Complaint . . . COM
Request for Oral Argument . . . by Deft's. . . . COM

8/ 5 Case is reassigned to Judge Moore . . . counsel notified.

8/ 6 MINUTE ORDER . . . def request for oral argument GRANTED . . . argument set 9/20/82 at 8:30 . . . COM . . . eod 8/6/82

8/30 Pltf's Rebuttal brief to deft's Motion to Dismiss for failure to state a claim under 42-USC-1983 . . . c.o.m.

9/14 Deft's Reply Brief to Pltf's Brief in Opposition to the Motion to Dismiss the Amended Complaint for Failure to State a Claim upon Which Relief can be Granted . . . com

9/20 HEARING (JPM) . . . ON deft's Motion to dismiss . . . Motion by Mr. Dyer for admission of Mr. Donnelly pro hac vic is granted . . . ORDERED: Pltf may file memorandum limited to response to cases cited by deft during this hearing within one week . . . MATTER TAKEN UNDER ADVISEMENT . . . eod 9/21/82

9/27 Pltf's Rebuttal brief to deft's oral argument . . . c.o.m.

10/ 1 MEMORANDUM OPINION AND ORDER (JPM) . . . Defts' motion to dismiss is granted and the complaint and cause of action are dismissed. Each party to pay own costs . . . c.o.m. eod 10/5/82.

10/29 NOTICE OF APPEAL, filed by Plaintiff, re Order of 10/1/82. C.O.S. Designation Conference set for Tues., 11/9/82 at 9:00 a.m. Transcript Order due 11/9/82. (fees not paid).

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DATE	FILINGS—PROCEEDINGS
11/ 9/82	CS.DKT Case docketed.
11/10/82	ROA.F Record on appeal filed. Vol. I (pleadings) (117pp). orig.
11/17/82	DKT. ST.F. Appellant's docketing statement filed, orig. & 6cc, c/s,MC
12/21/82	BR.F Appellant's brief filed, orig. + 9cc., c/s
2/25/83	BR.F Appellee's brief filed, orig. + 9cc., c/s
3/15/83	BR.F Appellant's reply brief filed, orig. + 9cc., c/s
1/14/84	ADD.AUTH.F Appellant's additional authority filed, orig & 9cc,c/s.
2/ 3/84	CS.ARG.SUBM—Case argued and submitted—Seth, Seymour, Anderson
4/24/84	ADD.AUTH.F. Appellant's second additional authority filed, orig & 9cc,c/s
3/20/85	OPN.F. Published, signed opinion filed. Seth, Seymour, Anderson. Writing Judge is Seymour JM.DISP. Judgment reversed. The cause is remanded. DIS.OPN.F. Published, dissenting opinion filed. Writing Judge is Seth.
4/18/85	P.REHRG.ENB.F/SUBM Appellee's petition for rehearing with suggestion for rehearing en banc filed, orig + 10cc,c/s
6/10/85	RMK.F Appellee's supplement to petition for rehearing in banc filed, orig. + 9cc., c/s
6/17/85	P.REHRG.ENB. DISP. Denied appellee's petition for rehearing en banc. En banc panel. Parties notified by mail.
*8/30/85	P.WRIT.CERT.F Appellee's, Connolly, petition for writ of certiorari filed 8/22/85. Supreme Court No. 85-298
12/ 5/85	P.WRIT.CERT.DISP. Supreme Court notice of granting of certiorari on 12/2/85.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. ———

ANDREW K. BURT,

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants.

COMPLAINT

(Filed October 20, 1985)

Plaintiff, for his Complaint against Defendants, states alleges and avers as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff is a resident of the State of Colorado.

2. Defendants are residents of the State of Nebraska.

3. The amount in controversy herein, exclusive of interest and costs, exceeds the sum of $10,000.00, and the jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. Section 1332.

4. Venue is proper in this district pursuant to the provisions of 28 U.S.C. Section 1391(a).

FIRST CLAIM FOR RELIEF

5. Plaintiff is a medical doctor, having received his medical training at the University of Nebraska Medical School.

6. Defendant Connolly, at all time relevant hereto, has been a Professor in and Chairman of the Department of Orthopedic Surgery And Rehabilitation of the University of Nebraska Medical School.

7. Defendant Board of Regents of the University of Nebraska ("Regents") is the employer of Defendant Connolly.

8. During his medical training at the University of Nebraska, Plaintiff successfully completed both the undergraduate medical program and a resident's program in orthopedic surgery. On or about June 30, 1977, Plaintiff was issued a certificate of residency in orthopedic surgery by the University of Nebraska Medical School, signed by Defendant Connolly.

9. On several occasions since completing his medical training and residency, Plaintiff has sought to obtain hospital staff privileges in the area of orthopedic surgery and otherwise practice his profession of orthopedic surgery in the State of Colorado.

10. The various hospitals contacted by Plaintiff have in turn contacted Defendant Connolly inquiring about Plaintiff's performance in the University of Nebraska Orthopedic Surgery Residency Program.

11. On each occasion when so contacted, Defendant Connolly, acting within the scope of his employment with the University of Nebraska and with the knowledge of the University, has stated orally and/or in writing that Plaintiff's performance in the Orthopedic Surgery Program was well below average, that as a result thereof Plaintiff has not been recommended for Board eligibility and that Plaintiff would not serve adequately in the field of

orthopedic surgery. Such statements were published in the State of Colorado.

12. The foregoing statements by Defendant Connolly were false when made and made with malice on the part of Defendant Connolly toward Plaintiff.

13. Such statements have directly harmed Plaintiff in his profession by lessening his reputation as a medical doctor among his peers and the public in general, and making it impossible for Plaintiff to practice his specialty of orthopedic surgery. Plaintiff has been denied hospital *staff privileges,* not only in the area of orthopedic surgery, but in emergency room treatment as well, specifically as a result of such statements.

14. As a result of being unable to practice his specialty or function as an emergency room physician, Plaintiff has suffered loss of remuneration, profits and business opportunity in the amount of at least $500,000.00.

15. Plaintiff additionally should be awarded punitive damages in the amount of $1,000,000.00 as a result of the malicious nature of Defendant Connolly's conduct.

WHEREFORE, Plaintiff prays the court for judgment in his behalf and against Defendants jointly and severally as follows:

A. General damages in the amount of at least $1,000,000.00.

B. Special damages in the amount of at least $500,000.00.

C. Punitive damages in the amount of at least $1,000,000.00. For his costs of this action.

D. Attorneys fees and such other and further relief as to the court may seem proper.

SECOND CLAIM FOR RELIEF

16. Plaintiff repeats and realleges Paragraph 1 through 13 of his First Claim for Relief.

17. At the time of his entry into the University of Nebraska Medical School, Plaintiff and Regents contracted that if Plaintiff successfully completed the undergraduate medical program and any subsequent specialty programs, Plaintiff would be qualified to practice medicine in such fields.

18. Despite having successfully completed such programs as stated previously, Defendants Connolly and Regents now take the position that Plaintiff is unqualified to practice his specialty of orthopedic surgery.

19. Such conduct on the part of Defendants amounts to breach of contract, for which Plaintiff has suffered actual damages of at least $500,000.00.

WHEREFORE, Plaintiff prays for judgment in his behalf and against Defendants jointly and severally in the amount of at least $500,000.00, for his costs of this action, attorneys fees and such other and further relief as to the court may seem proper.

THIRD CLAIM FOR RELIEF

20. Plaintiff repeats and realleges Paragraphs 1 through 13 of his First Claim for Relief.

21. The conduct of Defendants in causing the hospital to refuse to grant Plaintiff staff privileges in orthopedic surgery and emergency room treatment amounts to interference with contract or interference with prospective advantage.

22. Plaintiff has been directly damaged as a result of such interference in the amount of at least $500,00.00.

23. Defendants conduct in interferring with Plaintiff's contract or prospective advantage has been willful and wanton and punitive damages in the amount of at least $1,000,000.00, should be awarded therefore.

WHEREFORE, Plaintiff prays the court for judgment in his behalf and against Defendants jointly and severally in the amount of at least $500,000.00 for actual damages and $1,000,000.00 punitive damages, for his costs of this action, attorneys fees, and such other and further relief as to the court may seem proper.

FOURTH CLAIM FOR RELIEF

24. Plaintiff repeats and alleges Paragraph 1 through 13 of his First Claim for Relief.

25. Defendants conduct as stated amounts to outrageous conduct, which has directly damaged Plaintiff in the amount of at least $500,000.00.

26. Such conduct was willful and wanton and punitive damages in the amount of at least $1 000,000.00, should be awarded therefore.

WHEREFORE, Plaintiff prays the court for judgment in his behalf and against Defendants jointly and severally in the amount of at least $500,000.00 for actual damages and $1,000,000.00 punitive damages, for his costs

of this action, attorneys fees, and such other and further relief as to the court may seem proper.

Address of Plaintiff:

6901 South Yosemite Street
Englewood, Colorado 80112

HANNON, STUTZ,
DYER & MILLER
By: /s/ Robert J. Dyer, III
Attorneys for Plaintiff
825 Logan Street
Denver, Colorado 80203
Telephone: 861-1200

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-1850

[Title omitted in printing]

MOTION TO QUASH SERVICE OF PROCESS AND TO DISMISS THIS ACTION FOR LACK OF SUBJECT MATTER AND IN PERSONAM JURISDICTION, IMPROPER VENUE, INSUFFICIENCY OF PROCESS AND SERVICE OF PROCESS AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

COME NOW the defendants, The Board of Regents of the University of Nebraska and John F. Connolly, specially appearing by and through their attorneys, Pryor, Carney and Johnson, a professional corporation, and hereby move this honorable court to quash the return of service of the Summons herein and to dismiss this action for lack of subject matter and in personam jurisdiction, lack of proper venue, insufficiency of process and service of process, and for failure to state a claim upon which relief can be granted, and AS GROUNDS THEREFOR, defendants state unto the court the following:

1. Plaintiff alleges that he is a resident and citizen of the State of Colorado and brings this action stating claims for defamation, breach of contract, interference with prospective advantage, and outrageous conduct.

2. The claims asserted by plaintiff arise from defendant Connolly's response to inquiries made by a Colorado hospital, with the consent, express or implied, of the plaintiff, concerning the plaintiff's performance as a resident in orthopedic surgery at the University of Nebraska Medical Center located in the City of Omaha, State of Nebraska.

3. The latter three claims for relief are derivative of the First Claim for Relief, sounding in defamation.

4. Defendant Connolly is sued only in his official capacity as an employee of the Board of Regents of the University of Nebraska.

5. The Board of Regents of the University of Nebraska is an agency of the State of Nebraska. *See, Catania v. University of Nebraska,* 204 Neb. 305, 282 N.W.2d 27 (1979).

6. The principal place of business of the University of Nebraska is located within the State of Nebraska.

7. Defendant Connolly is a citizen and resident of the State of Nebraska, at all pertinent times herein, served in the capacity as an employee of the University of Nebraska as Chairman of the Department of Orthopedic Surgery at the University of Nebraska medical center in Omaha, Nebraska.

8. No defendant in this case is licensed or authorized to do business within the State of Colorado, nor do any of them do business within the State of Colorado for jurisdictional purposes.

9. Neither the Board of Regents of the University of Nebraska nor Dr. Connolly own any real property situated within the State of Colorado, and neither defendant is engaged in the business of contracting to insure any person, property or risk residing or located within the State of Colorado.

10. Defendants maintain no office, place of business, teaching, or research facility within the State of Colorado.

11. With respect to the claims asserted by plaintiff, no defendant was ever actually physically present within the State of Colorado.

12. This action involves not a suit between citizens of different states, but a suit between a citizen of Colorado against the State of Nebraska which is not a citizen for purposes of diversity jurisdiction.

13. This is not a civil action in which jurisdiction is founded only on diversity of citizenship, and therefore 28 U.S.C. § 1391(a) does not confer proper venue.

14. There has been no commission of a tortious act within the State of Colorado by either defendant, and alternatively, even if this court should determine that the allegations of the Complaint are sufficient to show commission of a tortious act within this state by one or both defendants, there are not sufficient minimal contacts between defendant and this state to afford this court a sufficient basis to exercise its jurisdictional power over the subject matter of this case or the person of either defendant.

15. Plaintiff's attempt to obtain jurisdiction over these defendants violates due process in that neither defendant is present within the territory of this forum, has not committed a tortious act within this forum, has never been physically present in this state with respect to the claims stated, nor have performed any act enumerated in C.R.S. 1973 § 13-1-124, and defendants do not have sufficient contacts with the State of Colorado to allow this court to exercise its jurisdictional power over either of them consistent with constitutional limitations.

16. The Complaint fails to state a claim upon which relief can be granted for the reason that defendant is a Nebraska state agency and defendant Connolly is sued only in his capacity as an employee of this state agency, and plaintiff's claims are barred by the doctrine of sovereign immunity and plaintiff's failure to avail himself of available administrative remedies through the Nebraska Tort Claims Act. Furthermore, the defamation claim is barred, in whole or in part, by one-year limitation of actions. In both the State of Nebraska and Colorado, the remaining claims, being solely derivative thereof, are also barred.

17. Venue in this case is also improper under the doctrine of forum non conveniens.

18. Defendants incorporate by reference their memorandum brief and affidavits to be filed in support of this motion as if fully set forth herein.

19. Pursuant to Rule 12(b) of the Federal Rules of Civil Pdocedure, this action should be dismissed for lack of jurisdiction over the subject matter, lack of jurisdiction over the person of defendants, improper venue, insufficiency of process and service of process, and failure to state a claim upon which relief can be granted as will be more fully delineated in defendants' memorandum brief and affidavits.

WHEREFORE, defendants, The Board of Regents of the University of Nebraska and John F. Connolly, respectfully request this honorable court to enter its order quashing the return of service of process and dismissing the instant action for the reasons set forth above and to afford

defendants such other and further relief as the court deems appropriate under the circumstances.

Respectfully submitted,

PRYOR, CARNEY and JOHNSON
A Professional Corporation

By: /s/ Thomas L. Roberts
7503 Marin Drive, Suite 2D
Englewood, CO 80111

Attorneys for Defendants

[Certificate of Mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

COME NOW the defendants, THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY, by and through their attorneys, PRYOR, CARNEY AND JOHNSON, a Professional Corporation, and respectfully submit the following Memorandum in support of their Motion to Dismiss.

I. PRELIMINARY STATEMENT

The present action involves claims asserted by the plaintiff, Andrew K. Burt, against The Board of Regents of the University of Nebraska ("Board of Regents") and John F. Connolly, M.D. ("Dr. Connolly").

Plaintiff claims that he pursued graduate medical training at the University of Nebraska as a resident in the field of orthopedic surgery, and that on June 30, 1977 he completed his residency program. [Plaintiff's Complaint, ¶ 8.] Since that time, plaintiff contends that he has applied for staff privileges at various hospitals in Colorado, which have, in turn, contacted the University of Nebraska regarding plaintiff's academic performance as an orthopedic resident. It is asserted that in response to these inquiries, Dr. Connolly, while acting in his official capacity as the Chairman of the Department of Orthopedics and Rehabilitation of the University of Nebraska College of Medicine, stated that plaintiff's performance was "well below average." [*Id.* at 11.] As a result, plaintiff contends, *inter*

alia, that he has been denied staff privileges at Colorado hospitals and that his reputation has been harmed. [*Id.* at 13.] Claims of defamation, breach of contract, interference with prospective advantage and outrageous conduct have been asserted against defendants.[1]

As will be discussed below, this Court lacks subject matter jurisdiction over plaintiff's claims, both because the requisite diversity of citizenship is not present and by operation of the Eleventh Amendment. Additionally, this Court may not, consistent with the due process guarantees of the Fourteenth Amendment, properly exercise *in personam* jurisdiction over defendants.

Accordingly, defendants respectfully submit that this Court should grant the present Motion, dismissing plaintiff's claims.

Alternatively, even if this Court should conclude that both subject matter and personal jurisdiction exist, this case should nevertheless be transferred to the District Court for the District of Nebraska pursuant to 28 U.S.C. § 1404(a).

---

[1]While it is, of course, true that the plaintiff's factual allegations must be accepted by this Court for the purpose of the present Motion, it is nonetheless apparent that the sole basis for plaintiff's claims is a letter written by Dr. Connolly to the Director of Medical Education at Presbyterian Hospital in Denver on October 20, 1980. A copy of this letter is attached to Dr. Connolly's Affidavit, which is appended as an exhibit hereto. Since a one-year statute of limitations governs libel and slander claims in both Colorado and Nebraska, C.R.S. 1973 § 13-80-101, Neb. Rev. Stat. 1943 § 25-208, and since plaintiff's Complaint was filed on October 20, 1981, the only potentially actionable letter of Dr. Connolly is the October 20, 1980 letter. The remaining Claims for Relief asserted by plaintiff will also be governed by a one-year statute, for these claims are merely derivative of the underlying defamation claim.

II. SUMMARY OF ARGUMENT

This Court lacks jurisdiction over the subject matter of this suit for the following reasons.

The plaintiff has brought suit against the Board of Regents, an agency of the State of Nebraska, and against Dr. Connolly in his capacity as Chairman of the Department of Orthopedic Surgery at the University of Nebraska. These defendants are not "citizens" within the meaning of 28 U.S.C. § 1332 and, therefore, no diversity jurisdiction exists. Since the allegations of plaintiff's Complaint do not involve any federal question or claim arising under federal statute or treaty or the federal Constitution, this Court lacks subject matter jurisdiction over the present controversy.

Furthermore, the Eleventh Amendment bars this Court from exercising jurisdiction over the Board of Regents and Dr. Connolly.

The Court lacks *in personam* jurisdiction over the defendants because no act was committed within the State of Colorado within the meaning of the Colorado long-arm statute. However, even assuming, *arguendo*, that service of process under the long-arm statute was proper, the defendants lack sufficient contacts with the State of Colorado to satisfy minimum due process requirements of the Fourteenth Amendment. Therefore, the Court must dismiss this action for lack of *in personam*-jurisdiction.

Alternatively, this Court should exercise its discretion and order a change of venue pursuant to 28 U.S.C. § 1404(a) because the State of Colorado is an inconvenient forum and justice will be better served by transferring this case to the State of Nebraska.

III. THE COURT HAS NO SUBJECT MATTER JURISDICTION OVER THIS ACTION

A. DIVERSITY OF CITIZENSHIP.

As pleaded, plaintiff asserts only nonfederal, common law causes of action. This case involves no federal question nor any claim for relief arising under any federal statute, treaty, or constitutional provision. If subject matter jurisdiction exists in this case, therefore, it must be found, if at all, pursuant to this Court's jurisdiction over controversies arising between citizens of different states.[2]

This is not such a case for the simple reason that neither a state, a state agency nor a state employee sued in his official capacity is considered a "citizen" for the purposes of diversity jurisdiction.

It is beyond dispute that a state is not a "citizen" within the meaning of 28 U.S.C. § 1332(a). *State Highway Comm. v. Utah Construction Co.*, 278 U.S. 194 (1929). This rule was first enunciated by the United States supreme Court as follows:

> A state is not a citizen. And, under the judiciary acts of the United States, it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws, or treaties of the United States.

---

[2]Indeed, in paragraph 3 of his Complaint, plaintiff specifically invokes the diversity jurisdiction of this Court pursuant to 28 U.S.C. § 1332.

Postal Telegraph Cable Co. v. State of Alabama, 155 U.S. 482, 487 (1894). *Accord, Moore v. County of Alameda*, 411 U.S. 693, 717 (1973).

Similarly, state agencies or officers thereof may not be considered citizens for the purpose of federal diversity jurisdiction. *See generally Annot.*, 6 A.L.R. Fed. 615 (1971). Thus, for example, in *Roberson v. Dale*, 464 F. Supp. 680 (M.D.N.C. 1979), plaintiff sued the University of North Carolina and the University of North Carolina at Chapel Hill, claiming that those institutions had, *inter alia*, breached an employment contract. The court, in dismissing plaintiff's claim for lack of subject matter jurisdiction, held that the Universities were "alter-egos" or agencies of the State of North Carolina and therefore not citizens for diversity purposes.

> It is well settled that a state is not a "citizen" within the meaning of 28 U.S.C. § 1332(a). It is also settled law that a federal court has no jurisdiction under 28 U.S.C. § 1332 to hear a case where the defendant is merely an alter-ego of a state.
>
> * * *
>
> It follows that when [defendant] hires a person to teach its students, and to fulfill the state's constitutional command, it is acting as agent of the General Assembly and not in its own monetary interest.
>
> The Court holds that [defendants] are "alter-egos" of the State of North Carolina and that the State is therefore the real defendant party in interest in this action. Diversity of citizenship between the parties is consequently lacking. The claim may be pursued only in state court.

464 F. Supp. at 686, 689 (citations and footnote omitted). Hence, neither a state agency, such as a state university, nor a state official sued in his official capacity is a "citi-

zen" under 28 U.S.C. § 1332(a). and diversity jurisdiction simply may not be predicated upon the joinder of such parties.

In the present case, the Board of Regents is a "state agency" and not a political division of the State of Nebraska. The Nebraska Supreme Court has so held in *Catania v. The University of Nebraska,* 282 N.W.2d 27 (Neb. 1979). The University of Nebraska is funded and operated through appropriations made by the Nebraska legislature, and any judgment as might enter against the University of Nebraska is ultimately payable by the State of Nebraska. Thus, the State of Nebraska is the real party in interest in this case.

Moreover, Dr. Connolly has been sued solely in his capacity as an employee of the Board of Regents, not in an individual capacity; therefore, his inclusion as a defendant in this case in no way affects the fact that the State of Nebraska is the defendant and real party in interest in this case.

In conclusion, then, there is no diversity of citizenship jurisdiction with respect to the claims presented here since they do not involve claims between citizens of different states, but rather, claims asserted by a citizen of Colorado against the sovereign State of Nebraska. In light of the absence of any claim pursuant to federal statute, treaty, or the federal Constitution, this Court lacks jurisdiction over the subject matter of this case, and has no alternative but to dismiss the instant suit.

This question is, of course, entirely dispositive of the instant Motion. Should the Court determine, as defendants respectfully request it should, from the Complaint,

affidavits, and legal authorities in this Memorandum that this is an action between a citizen of the State of Colorado and the State of Nebraska, the Court need go no further and must order immediate dismissal of this action.

B. THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the Constitution of the United States circumscribes the jurisdiction of federal courts when a state has been sued. The Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Thus, a state is immune from suit in federal court brought by the citizen of another state unless it consents, either expressly or impliedly, to being sued. *Edelman v. Jordan,* 415 U.S. 651, 672 (1974). *See, e.g., Unified School Dist. No. 480 v. Epperson,* 583 F.2d 1118, 1121 (10th Cir. 1978). The Eleventh Amendment does not merely limit the right of a litigant to seek relief against a sovereign state; rather, it imposes an absolute jurisdictional bar to the joinder of a state as a party defendant. *Savage v. Com. of Pennsylvania,* 475 F. Supp. 524, 529 (E.D. Pa. 1979), *aff'd without opinion,* 620 F.2d 289 (1980).

Under the Eleventh Amendment, immunity to suit extends not only to states themselves, but also to state agencies. *Unified School Dist. No. 480 v. Epperson, supra; Allsup v. Knox,* 508 F. Supp 57, 61 (E.D. Ky. 1980).

A state university is ordinarily considered to be an agency of the state and is therefore imbued with Eleventh

Amendment immunity to suit in federal court. *See, e.g., In re Holoholo,* 512 F. Supp. 889, 894-95 (D. Hawaii 1981); *Vaughn v. Regents of University of California,* 504 F. Supp. 1349, 1352-53 (E.D. Ca. 1981); *An-Ti Chai v. Michigan Technological University,* 493 F. Supp. 1137, 1162-64 (W.D. Mich. 1980); *Zentgraf v. Texas A&M University,* 492 F. Supp. 265, 271 (S.D. Tex. 1980); *Jacobs v. College of William and Mary,* 495 F. Supp. 183, 189 (E.D. Va. 1980); *Board of Regents of University of Nebraska v. Dawes,* 370 F. Supp. 1190, 1191 (D. Neb. 1974); *Brennan v. University of Kansas,* 451 F.2d 1287, 1290 (10th Cir. 1971); *Williams v. Eaton,* 443 F.2d 422, 427-29 (10th Cir. 1971). Here, because the University of Nebraska and the Board of Regents are "under the direction" of the Nebraska legislature, Constitution of Nebraska, Art. VII, Section 10, because the Board of Regents of the University performs an essential governmental function, because the medical residency program at issue in this case was funded directly by the Nebraska legislature, Neb. Rev. Stat. 1943 § 71-5203, and because any judgment which might enter against the Board of Regents or the University of Nebraska is ultimately payable by the State of Nebraska [Affidavit of Richard Wood, attached hereto as Exhibit "A," at 22], it is readily apparent that the Board of Regents is an agency of the State of Nebraska. *See Cantania v. The University of Nebraska, supra.*

Accordingly, since the Board of Regents is an agency of the State of Nebraska and is therefore entitled to Eleventh Amendment immunity, and since the State of Nebraska has not waived sovereign immunity with respect to the claims raised by the plaintiff in the case at

bar,[3] this Court is barred from exercising jurisdiction over the Board of Regents under the Eleventh Amendment.

Similarly, state officers are cloaked with Eleventh Amendment immunity when they are sued in their official capacity.

> And when the action is essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Ford Motor Co. v. Treasury Department, 323 U.S. 459, 464 (1945). *Accord, Quern v. Jordan,* 440 U.S. 332, 314 n.17 (1979); *Jones v. Illinois Dept. of Rehabilitation Services,* 504 F. Supp. 1244, 1257 (N.D. Ill. 1981). Again, inasmuch as the claims asserted against Dr. Connolly relate solely to his official acts as an employee of the Board of Regents, plaintiff is barred from pursuing his claims in federal court by the Eleventh Amendment.

Thus, since the very basis of plaintiff's Complaint is the recovery of money damages from an agency and officer of the State of Nebraska, and since the State of Nebraska has not consented or otherwise waived its sovereign immunity with respect to the claims asserted

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[3]The Nebraska Tort Claims Act, Neb. Rev. Stat. 1943 §§ 81-8.209 *et seq.*, establishes, *inter alia,* that the State of Nebraska, and its officers, agents and employees, shall not be liable for claims based upon the performance of a "discretionary function" or claims arising out of " . . . libel, slander . . . or interference with contract rights." Neb. Rev. Stat. 1943 § 8-8.219(1)(a), (1) (d). Plaintiff's claims, all of which are premised upon the allegedly defamatory letter of Dr. Connolly, may not therefore be maintained against defendants under the terms of the Nebraska Tort Claims Act, and no waiver of sovereign immunity has occurred with respect to such claims.

here, this Court lacks jurisdiction altogether over the present case.

Defendants therefore submit that because this Court lacks jurisdiction because of the provisions of the Eleventh Amendment, this case must be dismissed.

IV. THE COURT SHOULD DECLINE TO EXERCISE PERSONAL JURISDICTION OVER DEFENDANTS

A. COLORADO LONG-ARM JURISDICTION.

Colorado's long-arm statute provides as follows:

> (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the State of Colorado, either in person or by an agent, submits such person, and, if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> (a) The transaction of any business within this state;
>
> (b) *The commission of a tortious act within this state;*
>
> (c) The ownership, use, or possession of any real property situated in this state; or
>
> (d) Contracting to insure any person, property or risk residing or located within this state at any time of contracting.

C.R.S. (1973) §§ 13-1-124(1)(a)-(d) (emphasis added).

In enacting this statute, the General Assembly "intended to extend the jurisdiction of our courts to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." *Safari Outfitters, Inc. v. Superior Court,* 167 Colo. 456,

448 P.2d 783, 784 (1969). Conversely, the General Assembly "did not intend that the long-arm statute be construed to permit jurisdiction to be asserted where to do so would violate due process of law." *Le Manufacture Francaise v. District Court*, — Colo. — , 620 P.2d 1040, 1044 (1980).

For purposes of the present Motion only, defendants will concede that the "tortious act" standard of the long-arm statute has been satisfied. It is generally held that in a defamation action. the place of publication is the place of the wrong. *St. Clair v. Righter*, 250 F. Supp. 148 (D.C. Va. 1966).[4]

However, the conclusion that the alleged conduct of defendants falls within the provisions of the Colorado long-arm statute is not alone dispositive of whether this Court may exercise *in personam* jurisdiction over defendants. Rather, the Court must, utilizing a two-part analysis, determine whether the application of the long-arm statute to defendants under the facts of this case comports with minimum due process requirements of the Fourteenth Amendment. *Le Manufacture Francaise v. District Court*, *supra*, 620 P.2d at 1044; *Knight v. District Court*, 162 Colo. 14, 424 P.2d 110, 113 (1967).

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[4]Although defendants concede that Colorado is the place of the alleged injury, defendants maintain that their response to a request from Denver Presbyterian Hospital, to which the plaintiff gave his actual and implied consent, does not constitute a publication and that, therefore, no "tortious act" has been committed. Defendants' statement that the plaintiff's "academic performance was well below average" is furthermore privileged.

B. DUE PROCESS CONSIDERATIONS.

The constitutional limitations of the state courts' power to exercise jurisdiction over a nonresident defendant have been definitely set forth in the following United States Supreme Court decisions. As stated in *International Shoe Co. v. State of Washington*, 226 U.S. 310 (1945), in order to subject a nonresident defendant to *in personam* jurisdiction within the territory of the forum, the defendant must:

> have certain minimal contacts with it such that the maintenance of the suit does not offend traditional notions 'of fair play and substantial justice.'

226 U.S. at 316. Since *International Shoe*, the jurisdictional reach of state courts consistently expanded. Thirteen years after that decision, however, the United States Supreme Court clearly pronounced that this expansive trend was not without limits:

> *But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.* Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending a foreign tribunal, a defendant may not be called upon to do so unless he has the minimal contacts with that state that are a prerequisite to its exercise of power over him.
>
> * * *
>
> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of a contact with a foreign state. The application of that rule will vary with the quality and nature of the defense activity. *It is essential in*

> *each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protections of its laws.*

Hanson v. Denckla, 357 U.S. 235, 251, 253 (1958) (citations omitted and emphasis added).

The United States Supreme Court has recently reiterated the principle that "the due process clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment." *Worldwide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). In *Worldwide Volkswagen Corp.,* the Court held that the petitioners, a nonresident retail dealer and his wholesale distributor, did not have sufficient minimum contacts to subject them to *in personam* jurisdiction in Oklahoma. The plaintiffs were driving through Oklahoma in an automobile purchased from the petitioners and were injured because of an alleged defect in the automobile. The Court stated that the fundamental inquiry should be whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hailed into court there." 444 U.S. at 297. The Court reasoned as follows:

> The Due Process clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

Id. (citation omitted). The Court held that insofar as the petitioners had not "delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum states," petitioners have

no "contact, ties or relations" with the State of Oklahoma. *Id.* at 299.

Similarly, in *Premier Corp v. Newsom,* 620 F.2d 219 (10th Cir. 1980), the Court of Appeals upheld the trial court's ruling that the defendants did not have sufficient minimum contacts with the State of Colorado to warrant the exercise by the Federal District Court in Colorado of personal jurisdiction over either of the two defendants. In *Premier Corp.*, the defendants were physicians, both citizens of South Carolina, who had entered into a purchase and management contract in South Carolina with Premier Corp. whereby some of the cattle bought by defendants were kept and maintained by plaintiffs in Colorado.

The Court held that, for purposes of this transaction, the defendants had never been in Colorado, and further, that the fact that the defendants knew, or should have known, that their cattle were maintained in Colorado was not significant.

Citing *International Shoe Company v. Washington, supra,* and *Milliken v. Mayer,* 311 U.S. 457 (1940), the Court stated that even though services of process might comport with local state law, such service must also comport with the Fourteenth Amendment. The Court refused to exercise *in personam* jurisdiction over the defendants under Colorado's long-arm statute because plaintiff's unilateral activity pursuant to the contract did not give rise to sufficient minimum contacts. The Court stated:

> To hold to the contrary would in the instant case mean that the defendants could be required to defend

> in any one of 50 states where [plaintiff] chose to maintain the cattle. Such is not our idea of fair play.

Id., 620 F.2d at 223.

Thus, the exercise of *in personam* jurisdiction over a nonresident defendant is dependent upon the defendant's activities in or contacts with the form. Only if the defendant has *purposely* conducted activities within the forum of such a significant character that he may reasonably expect to be haled into the forum's courts are the minimum due process requirements of the Fourteenth Amendment satisfied. Unilateral activity of the plaintiff simply cannot create the basis for the exercise of *in personam* jurisdiction over a nonresident defendant.

Here, the defendants' *only* contact with the State of Colorado was a response to a *solicited* request to evaluate the plaintiff's performance and qualifications during the time the plaintiff was a resident in orthopedic surgery at the University of Nebraska College of Medicine. Neb. Rev. Stat. § 71-5202 establishes a medical education residency program for the purpose of training resident physicians. It is the obligation of the Board of Regents and of the Chairman of the Department, in fulfilling the legislative mandate to conduct a residency program and to provide recommendations and evaluations for those residents who have participated in the program and who have requested such references. Upon termination or completion of residency program, residents can be expected to seek employment in any one of the 50 states. For this Court to hold that there are sufficient contacts between the residents and the State of Colorado on the basis of the defendants' response to a solicted reference would mean that the defendants could be required to defend in

any one of the 50 states where any former student or resident has chosen to relocate.

Moreover, the affidavits of Dr. Connolly and Richard Wood, counsel for the University of Nebraska, attached hereto as Exhibits "A" and "B," indicate that the defendants have no contacts with the State of Colorado. The defendants own no real property in Colorado and conduct no business within the State of Colorado. It cannot be said that the defendants have purposely availed themselves of the privilege of conducting activities within the forum state. The response to a solicited inquiry is a single and isolated occurrence and does not evidence a course of action deliberately designed to move into the forum state.

Finally, the very nature of plaintiff's claims also militates against the exercise of *in personam* jurisdiction by this Court. ". . . First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." *New York Times Co. v. Connor,* 365 F.2d 567, 572 (5th Cir. 1966). Since the totality of defendants' contacts with Colorado involve the written response to a solicited request regarding plaintiff's academic performance, the exercise of personal jurisdiction here would impermissibly encroach upon defendants' First Amendment rights.[5]

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[5]Defendants anticipate that plaintiff will point to a line of cases holding that the publication of allegedly defamatory material within the forum is a sufficient basis upon which to predi-

(Continued on following page)

Although service of process upon these defendants may technically have comported with the provisions of the Colorado long-arm statute, there are insufficient minimum contacts between the State of Colorado and these defendants to satisfy due process considerations under the Fourteenth Amendment. This is particularly true where the plaintiff's claims arise out of an alleged libel. Defendants' response to a solicited inquiry resulted in a privileged "publication," which publication constituted an isolated and single act. Defendants have the obligation under their mandate to conduct a residency program to write letters of verification and recommendation to former residents and their prospective employers. Such a letter could and would have been written on behalf of any resident and could have been sent to any state within the United States. Such conduct certainly does not rise to the level of "minimum contacts" required by the Fourteenth Amendment.

This Court should, therefore, decline to exercise *in personam* jurisdiction over the defendants because defendants have no "contact, ties or relations" with the State of Colorado. *Worldwide Volkswagen Co. v. Woodson, supra.*

(Continued from previous page)

cate the exercise of *in personam* jurisdiction. *See, e.g., Akbar v. New York Magazine,* 490 F. Supp. 60 (D.D.C. 1980); *Pfeiffer v. International Academy of Biomedic Medicine,* 521 F. Supp. 1331 (W.D. Mo. 1981). Significantly, these cases involve *commercial* media defendants. Inasmuch as defendants in the present case merely responded to a solicited request from a Colorado hospital, the foregoing cases are inapposite here. Certainly, where the defendants are not in the business of promoting or distributing publications within the forum, it cannot be maintained that an isolated written response to an inquiry amounts to purposeful activity within the forum.

V. ALTERNATIVELY, THIS COURT SHOULD TRANSFER THIS ACTION UNDER 28 U.S.C. § 1404(a) ON THE GROUNDS OF FORUM NON CONVENIENS

28 U.S.C. § 1404(a) allows for change of venue in order to prevent waste of time, energy and money and to protect the litigants, witnesses and the public against unnecessary inconvenience and expense. *Northwest Animal Hospital, Inc. v. Earnhardt*, 452 F. Supp 191 (W.D. Okla. 1977). Even if this Court finds that both subject matter and personal jurisdiction exist over plaintiff's claims, the Court should exercise its discretion and transfer this action to the District Court for the District of Nebraska.

The following factors have been considered by courts when ordering a change of venue: (1) the location of defendants' principal offices; (2) the residence of individual defendants; (3) the residence of potential witnesses; (4) the location of pertinent documents and records; and (5) the location where the challenged conduct was conceived, executed and performed. *Starnes v. McGuire*, 168 U.S. App. D.C. 4, 512 F.2d 918 (1974).

In the present action, the University of Nebraska has its principal and *only* offices in the State of Nebraska. Dr. Connolly in his capacity as Chairman of the Board of Orthopedic Surgery, has his sole residence within the State of Nebraska. The plaintiff completed his residency program at the University of Nebraska College of Medicine, and it is his academic performance during this period of time that is at issue. All witnesses, documents, and records which pertain to the plaintiff's residency program, to his performance and qualifications, and to the correspondence which these elicited, are located at the University of Nebraska in the State of Nebraska. The great majority

of potential witnesses, both for the plaintiff and for the defendants, reside in Nebraska.

Finally, the allegedly defamatory letter sent by Dr. Connolly in response to a request from Denver Presbyterian Hospital was drafted, written, typed and mailed within the State of Nebraska.

In view of the factors stated above, the defendants would be substantially inconvenienced unless this action is transferred to the District Court for the District of Nebraska. For these reasons, the Court should, under 28 U.S.C. § 1404(a), exercise its discretion and transfer this action to the Federal District Court in Nebraska.

———o———

CONCLUSION

For the reasons stated and upon the authorities cited above, the defendants respectfully request this Honorable Court to grant their Motion to Dismiss for Lack of Subject Matter an *In Personam* Jurisdiction or, in the alternative, to transfer this action to the District Court for the District of Nebraska under the provision of 28 U.S.C. § 1404a.

Respectfully submitted,

PRYOR, CARNEY and JOHNSON,
A Professional Corporation

By: /s/ Edward D. Bronfin #11170
for Thomas L. Roberts, #5304
Attorneys for Defendants
7503 Marin Drive
Marin III, Suite 2D
Englewood, Colorado 80111
(303) 771-6200

[Certificate of Mailing omitted in printing]

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

AFFIDAVIT

STATE OF NEBRASKA)
) SS.
COUNTY OF DOUGLAS)

COMES NOW the affiant, being first duly sworn, and states as follows:

1. My name is John F. Connolly, and I am a professor and Chairman of the Department of Orthopedic Surgery and Rehabilitation of the University of Nebraska College of Medicine. My business address is: Department of Orthopedic Surgery and Rehabilitation, University of Nebraska Medical Center, 42nd and Dewey Avenue, Omaha, Nebraska 68105.

2. As Chairman of the Department of Orthopedic Surgery, it is within the scope of my duties to respond to inquiries concerning the academic performance and proficiency of past and present residents in Orthopedic Surgery at the University of Nebraska College of Medicine.

3. I do not have present within the State of Colorado any registered agent for service of process.

4. I maintain no office or other place of business within the State of Colorado.

5. I maintain no listing in any local telephone or business directory within the State of Colorado.

6. I have no legal or equitable interest in, nor make use of any real or personal property situated within the State of Colorado.

7. I have never engaged in the business of insuring any person, property, or risk located within the State of Colorado.

8. I have never engaged in any educational research or recruiting in the State of Colorado.

9. I have never made a trip to the State of Colorado for any purpose relating to any transaction giving rise to this suit.

10. Marked Exhibit A, and attached hereto is a true copy of a letter dated October 14, 1980, from Presbyterian Denver Hospital, directed to and received by me in my capacity as the Chairman of the Department of Orthopedic Surgery and Rehabilitation of the University of Nebraska, which letter requested verification of Plaintiff's residency program and sought my opinion concerning Plaintiff's medical knowledge and related matters.

11. Marked Exhibit B, and attached hereto is a true copy of a letter dated October 21, 1980, which constituted my reply to the inquiry reported by Exhibit A.

12. Exhibit B was written, typed and placed in the United States Mail in the State of Nebraska.

13. Exhibit B was sent for the sole purpose of responding to Exhibit A, and Exhibit B was sent only in response to this solicited inquiry, and in the belief that the response would be held confidential.

14. Exhibit B represents my opinion and recommendation concerning the Plaintiff's academic performance

and qualification, and the contents thereof continue to be my opinion and recommendation.

/s/ John F. Connolly

[Subscription omitted in printing]

[EXHIBIT A to Affidavit of John F. Connolly]

Presbyterian Denver Hospital
a division of Presbyterian/Saint Luke's Medical Center
1719 East 19th Avenue, Denver, Colorado 80218
(303) 839-6000

October 14, 1980
John T. Connolly, M.D.
Program Director
Department of Orthopedics
University of Nebraska Medical Center
42nd and Dewey Avenue
Omaha, Nebraska 68105

Dear Dr. Connolly:

Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgement, personal habits, morals, ethics, etc.

Your answer will be confidential.

Sincerely,

/s/ Michael A. Lubchenco, M.D.
Director of Medical Education

MAL:mfw

[EXHIBIT B to Affidavit of John F. Connolly]

THE UNIVERSITY OF NEBRASKA
MEDICAL CENTER
42ND AND DEWEY AVENUE
OMAHA, NEBRASKA 68105

October 21, 1980
Michael A. Lubchenco, M.D.
Director of Medical Education
Presbyterian Denver Hospital
1719 East 19th Avenue
Denver, Colorado 80218

RE: Andrew Kelly Burt, M.D.

Dear Doctor Lubchenco:

In reply to your inquiry about Doctor Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Yours truly,
/s/ John F. Connolly, M.D.
Professor and Chairman

lat

[Immaterial letter head items omitted in printing]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

AFFIDAVIT

COMES NOW the Affiant, being first duly sworn, and states as follows:

1. My name is Richard R. Wood, and I am licensed to practice law within the State of Nebraska and am the General Counsel for the Board of Regents of the University of Nebraska (hereinafter "Board"), one of the defendants in this action, and am authorized to speak on its behalf.

2. The Board of Regents of the University of Nebraska is an agency of the State of Nebraska (and not a political subdivision) created pursuant to the Constitution of the State of Nebraska, Article VII, Section 10, and operated pursuant to state statutes.

3. The Board is a state agency engaged in the business of governing the University of Nebraska, including the University of Nebraska Medical Center.

4. The Board is neither licensed nor registered to do business as a foreign corporation within the State of Colorado, conducts no business within the State of Colorado, and is qualified to do and doing business only within the State of Nebraska pursuant to the University Charter and the Nebraska State Constitution.

5. The Board does not have present within the State of Colorado any registered agent for service of process.

6. The Board has no directors, officers, representatives, nor any other type of agent present within the State of Colorado.

7. The Board maintains no office or other place of business within the State of Colorado.

8. The Board has no employees or members present within the State of Colorado.

9. The Board maintains no listing in any telephone or business directory within the State of Colorado.

10. The Board does not own or use any real property situated within the State of Colorado.

11. The Board has never engaged in the business of insuring any person, property, or risk located within the State of Colorado.

12. The Complaint filed by plaintiff alleges, among other things, that the defendant Board breached a contract with the plaintiff, which contract, if it existed, would have been entered into and performed solely within the State of Nebraska.

13. The Board is not engaged in any teaching, research, or other service functions within the State of Colorado.

14. The Board maintains no physical or other facilities within the State of Colorado.

15. The Board has not and does not purposely avail itself of the privilege of doing business within the State of Colorado.

16. No member of the Board has ever been present within the State of Colorado with respect to any of the

transactions giving rise to this suit nor for any other purpose related to the business of the Board.

17. The University of Nebraska is an agency of the State of Nebraska, and all tort claims asserted against the Board must be asserted pursuant to the Nebraska Tort Claims Act pursuant to Neb. Rev. Stat. 1943 §§ 81-8,209 et. seq., a copy of which is marked Exhibit A, attached hereto, and incorporated by reference as if fully set forth herein.

18. Actions for libel or slander are barred in Nebraska unless brought within one year after they accrue pursuant to Neb. Rev. Stat. 1943 § 25-208, a copy of which is marked Exhibit B, attached hereto, and incorporated by reference as if fully set forth herein.

19. Any contract claim against the Board, as a prerequisite to suit, must first be presented to the Director of the State Department of Administrative Services, pursuant to Neb. Rev. Stat. 1943 §§ 24-319, 77-2,406 and 77-2,407, which govern claims against the state in actions which the state or a state agency, including the University of Nebraska, is a party, and a copy of these statutes is marked Exhibit C, attached hereto, and incorporated by reference as if fully set forth herein.

20. The Board is immune from suit based upon claims of libel and slander or interference with contract rights by virtue of subsection (d) of Neb. Rev. Stat. 1943 § 81-8,219, a copy of which is included within Exhibit A, attached hereto, and incorporated by reference as if fully set forth herein.

21. Operation of the University of Nebraska is primarily financed through general fund appropriations by the Legislature of the State of Nebraska, and the Board

has no independent means or ability to respond in damages in a suit of this type.

22. Any judgment as might enter against the Board of Regents of the University of Nebraska would be payable from state tax revenues appropriated to the Board by the Nebraska Legislature.

23. At all pertinent times hereto, John F. Connolly, M.D., was the chairman and director of the Department of Orthopedic Surgery of the University of Nebraska Medical Center.

24. As part of his official duties, Dr. Connolly is required to respond to inquiries as to the academic performance and other characteristics of former medical students and residents at the University of Nebraska Medical Center.

FURTHER Affiant sayeth not.

/s/ Richard R. Wood
General Counsel to the Board
of Regents of the University
of Nebraska

[Subscription omitted in printing]

[Exhibits to the affidavit of Richard R. Wood, consisting of photocopies of Nebraska statutes, have been omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, Andrew K. Burt ("Dr. Burt"), by and through his attorneys, HANNON, STUTZ, DYER & MILLER, submits the following Brief in Opposition to Defendants' Motion to Dismiss:

I. *PRELIMINARY STATEMENT*

It is important to note at the outset that Dr. Burt's claims are against Defendant John F. Connolly ("Connolly") both in his individual capacity and as an employee of Defendant Board of Regents. Dr. Burt has alleged that the actions of Defendant Connolly were intentionally designed to injure the Plaintiff and were accompanied with malice.

Assuming arguendo, that this Court finds that this action may not be maintained against the Defendant Board of Regents, nothing has been raised by the Defendants to bar this action against Defendant Connolly individually. Clearly, in his individual capacity, Defendant Connolly is a citizen of the State of Nebraska, and this Court has jurisdiction pursuant to 28 U.S.C. 1332.

When a state official acts beyond his statutory authority, he loses his official standing and is not protected against suit in Federal Court. *Read v. National Equity Life Ins. Co.*, 114 F.2d 977 (10th Cir. 1940). Similarly, in *Waller v. Professional Insurance Corp.*, 299 F.2d 193 (5th Cir. 1963), a motion to dismiss an individual claim was de-

nied as premature when the complaint alleged acts beyond his authority.

Finally, Defendant Connolly may not allege sovereign immunity as a defense to his individual actions. Nebraska follows the general rule stated in *Prosser on Torts* (4th Ed.) § 132:

> "There is no immunity where the inferior officer does not act honestly and in good faith, but maliciously, or for an improper purpose."

The Nebraska Supreme Court adopted a similar rule in *Allen v. Miller*, 142 Neb. 469, 6 N.W. 2d 594 (1942), and followed it in *Koch v. Grimminger*, 192 Neb. 706, 223 N.W. 2d 833 (1974).

Thus, even if this court finds that this action may not continue against Defendant Board of Regents, Dr. Burt requests leave to amend his complaint to drop all claims but the individual action against Defendant Connolly.

II. *WHETHER THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA IS A CITIZEN OF NEBRASKA FOR THE PURPOSES OF DIVERSITY JURISDICTION?*

The first issue raised by the Defendants relative to diversity jurisdiction is whether the Defendant Board of Regents is a political subdivision or an agency of the State of Nebraska. If the Defendant Board is found to be a political subdivision, it is considered a citizen for the purposes of diversity jurisdiction, *Kansas Turnpike Authority v. Abramson*, 275 F.2d 711 (10th Cir. 1960). Thus, this action would be properly maintainable in federal court if the Defendant Board was found to be a political subdivision. If the Defendant Board is found to be an

agency of the State of Nebraska, there is a split in the circuits as to whether diversity lies.

A. Is the Board of Regents of the University of Nebraska a subdivision or an agency of the State of Nebraska?

Although the Supreme Court in Nebraska recently found that the Board of Regents was an agency of the state, *Catania v. University of Nebraska,* 204 Neb. 304, 282 N.W.2d 27 (1979), in determining that issue for diversity purposes, a federal court is not bound by state decisions but must make an independent assessment. *Peter Kiewit & Sons-Const. Co. v. South Dakota State Highway Comm.*, 289 F. Supp. 333 (D.S.C. 1967).

The annotation found at 6 A.L.R. Fed. 615 (1971) lists five factors which have been considered by the courts in determining whether a body is an agency for the purposes of diversity. First, may the body sue or be sued in its own name? *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081 (6th Cir. 1976). If the body has the statutory authority to sue and be sued in its own name, it is more likely a subdivision than an agency.

In the case at bar, by statute, Neb. Rev. Rev. Stat. § 85-105, the Board of Regents has the power to sue and be sued.

The second factor considered in the annotation was whether the legislative enactment provided that the agency was to perform an "essential governmental function". *Dunnick v. Kansas St. Highway Comm.*, 21 F. Supp. 882 (D.C. Kan. 1937). Such language would indicate that the body is an agency rather than a subdivision. No such lan-

guage is present in the statutory scheme of the Defendant Board.

Another factor to be considered is whether the body has the power to hold property in its own name or whether the property is held in the name of the State. *Lenoir, supra.* In the case of the Defendant Board, § 85-105 also gives it the power to hold and dispose of property in its own name.

The fourth factor considered is whether the body has a corporate existence separate from the state. *Department of Health and Rehabilitation Services v. Davis,* 616 F.2d 828 (6th Cir. 1980). The existence of a separate corporate status tends to establish a subdivision rather than an agency. Here again, the statutory scheme provides that the Board of Regents is constituted as a body corporate.

The final factor considered by the annotation is the financial interests of the state. The Defendant Board is funded not only through appropriations from the state legislature, but also from donations, grants, and tuition and fees which it is required to collect. Thus, the only source of funds to pay a judgment in this case would not be the state's general fund.

Secondly, Neb. Rev. Stat. 1943 § 81-823 authorizes the state to obtain liability insurance. Upon information and belief, there is liability insurance which would cover this loss. Thus, the financial interests of the state should not be an important factor in this determination.

Given the list of factors considered by the courts in the past, it is clear that for diversity purposes the Defendant Board is a political subdivision of the State of

Nebraska, not an agency. As a subdivision, it is a citizen of that state, and this Court is properly vested with jurisdiction pursuant to 28 U.S.C. 1332. *Kansas Turnpike Auth., supra.*

B. If the Board of Regents is an agency of the State of Nebraska, is it a citizen of Nebraska for diversity purposes?

Even if this Court finds that the Defendant Board is an agency, not a subdivision, of the State of Nebraska, there is a split amongst the circuits as to whether an agency may be a citizen for diversity purposes. *Compare, Kirby Lumber Corp. v. Louisiana,* 293 F.2d 82 (5th Cir. 1961) and *State Highway Comm. v. Kansas City Bridge Co.,* 81 F.2d 689 (8th Cir. 1936).

The issue again appears to be who is the real party in interest. Since the Defendant Board has the power to collect fees and tuition, and has provided for liability insurance to cover this loss, it would appear to be the real party in interest. Thus, even if the Defendant Board if found to be an agency of the State of Nebraska, it still should be considered a citizen of that state for diversity purposes. *Missouri, Kansas & Topeka Railroad Co. v. Missouri Railroad & Warehouse Comm.,* 183 U.S. 53 (1901).

III. *WHETHER THE ELEVENTH AMENDMENT IS A BAR TO AN ACTION IN FEDERAL COURT AGAINST THE BOARD OF REGENTS OF THE UNIVERSITY OF NBRASKA?*

Defendants next argue that the eleventh amendment operates as a bar to a suit in federal court against the Defendant Board. First, if this Court determines that the Defendant Board is a subdivision rather than an agency, the eleventh amendment does not apply. In *Hopkins v.*

Clemson Agricultural College, 221 U.S. 636 (1911), the United States Supreme Court found that a state college was a subdivision of the state and that the eleventh amendment did not apply to political subdivisions.

Secondly, even if this Court finds that the Defendant Board is an agency of the state, the circuits are similarly split on whether such agencies share this immunity. *Compare, Hander v. San Jaucinta Jr. Col.,* 519 F.2d 273 (5th Cir. 1975) and *Walstad v. University of Minnesota Hospital,* 442 F.2d 634 (8th Cir. 1971). The Court in *Somi v. Board of Trustees of the Univ. of Tenn.,* 513 F.2d 347 (6th Cir. 1975) found that each agency must be considered on its own basis. In *Walstad,* the immunity was specifically reserved in the State constitution. In *Somi,* the court found that the immunity was waived by a provision providing that the Board could sue and be sued. Given the factors discussed above, it would again appear that the Defendant Board should be amenable to suit in federal court.

Thirdly, the State courts of Nebraska have consistently held that sovereign immunity is waived to the extent that there is liability insurance covering the loss. *Johnson v. Municipal Univ. of Omaha,* 184 Neb. 512, 169 N.W. 2d 286 (1969) and *Brown v. City of Omaha,* 183 Neb. 430, 160 N.W. 2d 805 (1968). Since there is insurance covering this loss, the state has waived its immunity to the extent of that insurance and has waived the bars of the eleventh amendment.

IV. *WHETHER THIS COURT HAS PERSONAL JURISDICTION OVER THESE DEFENDANTS UNDER THE COLORADO LONG-ARM STATUTE?*

Defendants contend that this Court lacks in personam jurisdiction over them because they have insufficient bus-

iness contacts within Colorado to come under Colorado's long-arm statute, § 13-1124, C.R.S. 1973. This statute provides:

> (1) Engaging in any act enumerated in this section . . . submits such person . . . to the jurisdiction of the courts of this state . . . :
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> . . .

Defendants concede that the tortious act alleged occurred in Colorado, as it is generally held that the place of publication is the place of the wrong. *St. Clair v. Righter*, 250 F. Supp. 148 (D.C. Va. 1966). Defendants contend, however, that in order to come under the statute, Plaintiff must establish both that a tort was committed in Colorado and that the Defendants did business in Colorado.

This is not what the statute says, nor is it the interpretation given the statute by the courts. In *People ex rel. Jeffers v. Gibson*, 181 Colo. 9, 508 P.2d 374 (1975), the Colorado Supreme Court found:

> "For jurisdiction to attach under the statute, there must be *either* a cause of action arising out of the commission of a tortious act in Colorado *or* the transaction of any business within this state."
> 508 P.2d at 376 (emphasis added).

Similarly, the Court in *Texas Flyers, Inc. v. District Court*, 180 Colo. 432, 506 P.2d 367 (1973), adopted the rule from other jurisdictions that when a nonresident commits a tort, no showing of continuous activity is required and jurisdiction is sustained by the commission of a single tort. This statute and interpretation have been upheld

in federal court., *Zerr v. Norwood,* 250 F. Supp. 1021 (D. Colo. 1966).

The cases cited and relied upon by these Defendants relate to products liability cases where there is an issue as to whether the tort took place. Thus, in *Luchina v. Futura, Inc.,* 260 F. Supp. 252 (D. Colo. 1966) the court required minimum contacts when the tortious act, the design of the product, occurred outside of Colorado, but the injury occurred in Colorado. In the case at bar, however, the Defendants have conceded that the tortious act occurred in Colorado.

Thus, the commission of the tort by Defendant Connolly within Colorado is sufficient to give this court jurisdiction under the long-arm statute.

Secondly, even if a requirement of minimal contacts is read into subsection (a) of the long-arm statute, those requirements have been met in this case. The leading case of *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958) cited at length in Defendants' Brief has been interpreted by the Supreme Court to mean "that the defendant must have taken voluntary action calculated to have an effect in the forum state." *Rosenblatt v. American Cyanamid Company,* 86 S.Ct. 1 (1965).

In the case at bar, it is alleged that Defendant Connolly acted maliciously and intended his actions to have a result in Colorado. Such actions did have the desired result in Colorado as Dr. Burt was denied hospital privileges. Thus, this Court has personal jurisdiction over these Defendants.

V. WHETHER THERE ARE SUFFICIENT GROUNDS TO TRANSFER THIS ACTION TO THE DISTRICT COURT FOR THE DISTRICT OF NEBRASKA?

Defendants finally argue that this action should be transferred to the District Court for the District of Nebraska pursuant to 28 U.S.C. § 1404(a) on the grounds of forum non conveniens. First, the Plaintiff's choice of venue is given substantial weight. *Galconda Mining Corp. v. Herlands,* 365 F.2d 856 (2d Cir. 1966). The burden of proof for such a motion is on the defendant. *Time, Inc. v. Mammy,* 366 F.2d 690 (5th Cir. 1966).

While Dr. Burt does not deny that witnesses from Nebraska may have to be called, witnesses from Colorado will also be necessary. The publication of the statements were made in Colorado. Witnesses to testify as to the effect of those statements and to the damages that Dr. Burt received because of that publication are all in Colorado.

Thus, there are clearly witnesses both in Colorado and in Nebraska who will be required to testify. The witnesses in Nebraska are all employees of the Defendant Board, while the witnesses in Colorado are independent of any of the parties. Thus, there is insufficient grounds for transferring this action under 28 U.S.C. and this court should deny Defendants' Motion.

VI. CONCLUSION

Plaintiff Andrew K. Burt, respectfully requests this court to deny Defendants' Motion to Dismiss and their Motion to Change Venue, or in the alternative, for leave

to file an amended complaint naming John F. Connolly in his individual capacity as the sole Defendant.

Respectfully submitted,

HANNON, STUTZ, DYER & MILLER

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

DEFENDANTS REPLY BRIEF
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS

COME NOW the defendants, The Board of Regents of The University of Nebraska and John F. Connolly, by their attorneys, Pryor, Carney and Johnson, a Professional Corporation, and respectfully submit the following Reply Brief in Support of Defendants' Motion to Dismiss.

I. PRELIMINARY STATEMENT

The present action involves claims of defamation, breach of contract, interference with prospective advantage and outrageous conduct asserted by plaintiff against defendants The Board of Regents of the University of Nebraska ("Board of Regents") and John F. Connolly, M.D. ("Dr. Connolly"), the Chairman of the Department Orthopedics and Rehabilitation at the University of Nebraska College of Medicine.

Plaintiff asserts that in response to inquiries made by various Colorado hospitals regarding his academic performance during an orthopedic residency at the University of Nebraska Medical School, Dr. Connolly replied in writing that plaintiff's performance was "well below average." Allegedly as a result of Dr. Connolly's evalution, plaintiff claims that he has been denied staff privileges at Colorado hospitals and that his reputation has been harmed.

In response to defendants' arguments that this Court lacks subject matter jurisdiction over The Board of Regents and Dr. Connolly, plaintiff now contends that the Board was a "political subdivision" of the State of Nebraska and that Dr. Connolly, in responding to the written inquiries, was apparently acting solely in his individual capacity. As will be discussed below, both contentions lack merit. Additionally, plaintiff's assertion that the mere commission of a tortious act within this state is enough, standing alone, to justify the invocation of long-arm jurisdiction is plainly eroneous. Finally, since the preponderance of all evidence and witnesses in this case are in Nebraska, this Court should transfer the action to the District Court for the District of Nebraska in the event that the Court concludes that jurisdiction exists over plaintiff's claims and the defendants.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER DEFENDANTS BOTH UNDER 28 USC § 1332 AND THE ELEVENTH AMENDMENT

A. Dr. Connolly.

In his Brief in Opposition to the present Motion, plaintiff boldly asserts that subject matter jurisdiction exists with respect to claims asserted against Dr. Connolly pursuant to 28 U.S.C. § 1332 because Dr. Connolly acted in his individual capacity.

Interestingly, aside from the assertion itself, plaintiff has alleged no facts which, even construed most favorably to the plaintiff, which state a claim against Dr. Connolly in his individual capacity. Rather, plaintiff has alleged:

> On each occasion when so contacted, Defendant Connolly *acting within the scope of his employment with*

> *The University of Nebraska* and with the knowledge of the University, has stated orally and/or in writing that plaintiff's performance in the Orthopedic Surgery Program was well below average . . .

Plaintiff's Complaint, ¶ 11 (emphasis added). The very allegations of plaintiff's complaint thus purport to state claims against Dr. Connolly *only* insofar as he was acting as an employee of or agent for the University of Nebraska.

Additionally, the uncontroverted facts of record establish that it was within the scope of Dr. Connolly's official duties as the chairman of the Orthopedics Department "to respond to inquiries concerning the academic performance and proficiency of past and present residents . . ." [Affidavit of Dr. Connolly, at 2; Affidavit of Richard W. Wood, at 24].

Hence, both plaintiff's own allegations and the undisputed affidavit facts conclusively establish that at the times relevant to this suit, Dr. Connolly was acting solely in his official capacity as an agent for the University of Nebraska Medical School.

It is settled that both for purposes of diversity of citizenship under 28 U.S.C. § 1332 and the Eleventh Amendment, a state officer sued in his official capacity is simply an "alter-ego" of the State. The joinder of such an official can, therefore, neither create diversity of citizenship nor overcome the strictures of the Eleventh Amendment.

In *Vaughn v. Regents of University of California*, 504 F. Supp. 1349 (E.D.Cal. 1981), for example, plaintiff asserted civil rights claims against the Board of Regents of the University of California at Davis and 19 employees

of the University. The Court held that the mere joinder of the individual defendants could not bypass or overcome the effect of the Eleventh Amendment.

> The Court must thus determine whether the entity sued herein, the Regents, is such an agency of the State of California that the State is in fact the real party in interest. *If the . . . damage claims against the Regents are barred by the Eleventh Amendment, those same claims against the employees of the University acting in their official capacities are likewise barred.*

504 F. Supp. at 1352 (citation omitted). *Accord, Ford Motor Co. v. Treasury Dept.*, 323 U.S. 459, 464 (1945); *Quern v. Jordan*, 440 U.S. 332, 345 n.17 (1979).

Similarly, a state officer or employee sued in his official capacity is, like the state or a state agency, not deemed a "citizen" for diversity purposes. "Where, as here, a state officer is sued merely as the representative or the 'arm or alter ego' of the State, for diversity purposes the action is treated as one against the State." *National Market Reports, Inc. v. Brown*, 443 F. Supp. 1301, 1305 (S.D.W.V. 1978).

In the present case, since the plaintiff's allegations and uncontroverted facts establish that Dr. Connolly was, at all relevant times, acting solely within his official capacity and as a representative of the University of Nebraska, he must, accordingly, be deemed to be merely an alter-ego of the State of Nebraska.[1] If, therefore, the

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[1]Apparently, the sole basis for plaintiff's contention that Dr. Connolly was acting in his individual capacity is the fact

(Continued on following page)

State of Nebraska and Board of Regents are immune from suit in this Court under either § 1332 or the Eleventh Amendment, such immunity necessarily extends to Dr. Connolly.

B. The Board of Regents.

Plaintiff, in an effort to label the Board of Regents a "political subdivision" of the State of Nebraska, relates a five-part test supposedly dispositive of the question. However, plaintiff has overlooked the particularly significant facts here.

It is beyond cavil that a state and state agency are *not* citizens within the meaning of 28 U.S.C. § 1332. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973). The determination of whether a state organization is a state agency depends *primarily* on the state's ultimate liability for the organization:

> In making this determination, the courts have considered a variety of factors: ability to sue and be

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(Continued from previous page)

that Dr. Connolly himself wrote and signed the allegedly defamatory letters. If Dr. Connolly had, in the privacy of his own home and on his own initiative, independently and without prior solicitation, sent letters to all hospitals in Colorado questioning plaintiff's professional abilities or credentials, then arguably he would have been acting in his individual capacty. However, such is clearly not the case here. Dr. Connolly responded to letters written to the University of Nebraska and on behalf of the University. Of course, since the University can only act through its agents, the fact that Dr. Connolly physically signed the letters is plainly insufficient to establish that he was acting in his individual capacity. Plaintiff's assertion that Dr. Connolly somehow acted "beyond his statutory authority," [Plaintiff's Brief, at 1], is unsupported by any facts or case authority.

> sued, lack of express authority to sue, performance by the entity of an "essential governmental function", power to take property in the name of the State, power to take property in its own name, corporate status, lack of corporate status, financial interest of the State, and absence of financial interest of the State.
>
> Of these factors "ultimate State liability" is the most determinative. Such ultimate liability would rest primarily upon two factors: the degree to which the organization is financially dependent on the State and the extent to which the organization performs a State obligation or function.

George R. Whitten, Jr., Inc. v. State Univ. Const. Fund, 493 F.2d 177, 179-80 (1st Cir. 1974) (footnotes omitted).

Thus, in *Ronwin v. Shapiro,* 657 F.2d 1071 (9th Cir. 1981), plaintiff sued, *inter alia,* the Board of Regents of the University of Arizona based upon the publication of an allegedly defamatory law review article. With little difficulty, the Ninth Circuit held that plaintiff's claim against the Board was barred under both § 1332 and the Eleventh Amendment, because the State of Arizona was the real party in interest and ultimately liable for any judgment which might enter.

> Although a number of factors may be considered, a crucial question in determining whether the suit should be regarded as one against the state is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.
>
> * * *
>
> . . . There is no evidence that the Board, acting in its corporate capacity, could satisfy a libel judgment in any way other than by turning to the state of Arizona. Consequently, we conclude that the Board of

> Regents is protected by the eleventh amendment, and, further, that *the Board is not a "citizen" within the meaning of 28 U.S.C. § 1332.*

657 F.2d at 1073 (emphasis added).

Moreover, as discussed in defendant's original brief, because a State University or Board of Regents fulfills the governmental function of education, neither may be considered a citizen under § 1332. *Roberson v. Dale,* 464 F. Supp. 680, 686, 689 (M.D.N.C. 1979).

Plaintiff, relying on generalized and vastly oversimplified principles, has simply chosen not to address the effect or impact of the above cases.

In the case at bar, it is undisputed that the University of Nebraska Medical School and Board of Regents were funded primarily through appropriations made by the Nebraska legislature [Affidavit of Richard R. Wood, at 21], and that any judgment which may enter against the Board of Regents would be payable from state funds [*id.*, at 22]. Additionally, "the Regents performs the essential governmental function of providing the citizens of the State of [Nebraska] with a higher education." *Vaughn v. Regents of University of California, supra,* 504 F. Supp. at 1353. Indeed, even the Nebraska Supreme Court has held that the Board of Regents is a state agency. *Catania v. The University of Nebraska,* 282 N.W.2d 27 (Neb. 1979).

Consequently, based upon the facts of record, it is plain that the Board of Regents is a state agency and may not, therefore, be deemed a citizen for diversity purposes under § 1332.

Similarly, the same facts establish that the Board of Regents is merely a alter-ego of the State and thus entitled to Eleventh Amendment immunity from suit in Federal Court. *Ronwin v. Shapiro, supra; Vaughn v. Regents of University of California, supra.* Plaintiff's claim that the State of Nebraska or the Board of Regents have waived their Eleventh Amendment immunity with respect to the claims asserted herein is simply unfounded. *See* Neb. Rev. Stat. 1943 § 81-8,219(1)(d).

Hence, in light of plaintiff's inability to come forward with any case law factually similar to the present case, and in view of the undisputed facts and overwhelming authority established by defendants, this Court should dismiss the present case both for lack of diversity of citizenship under 28 U.S.C. § 1332 and on account of the Eleventh Amendment.

III. THIS COURT SHOULD DECLINE TO EXERCISE PERSONAL JURISDICTION OVER DEFENDANTS UNDER THE COLORADO LONG-ARM STATUTE

Plaintiff maintains that long-arm jurisdiction over a nonresident defendant may be invoked merely if the defendant's alleged acts come within the terms of the Colorado long-arm statute. This position is plainly erroneous.

In *Le Manufacture Francaise v. District Court,* — Colo. — , 620 P.2d 1040 (1980), the Colorado Supreme Court held that the exercise of *in personam* jurisdiction over a non-resident defendant may not be predicated *simply* on the commission of a tortious act within the State. Rather, once that standard is satisfied, it must further be determined whether the exercise of personal jurisdic-

tion over the defendant comports with due process guarantees of the Fourteenth Amendment. "Therefore, the 'tortious act' standard of the long-arm statute has been satisfied *if* such a construction is consistent with due process of law." 620 P.2d at 1044 (emphasis added). A two-part analysis is therefore necessary.

As discussed in defendants original brief, even if it is assumed, *arguendo,* that defendants come within the literal wording of the Colorado long-arm statute, the defendants here have literally no contacts of any nature with the State of Colorado. Defendants have in no way availed themselves of doing business in Colorado, and certainly should not have foreseen that the mere act of mailing a letter to a Colorado hospital, in response to a solicited inquiry, would be enough to hale them before a Colorado court.

To accept plaintiff's argument would subject every user of the United States mails (and, by analogy, patrons of private mail carriers and even one who merely places a long distance phone call) to personal jurisdiction in courts of every jurisdiction throughout the United States. While the use of the mails may, if tied together with other activity, perhaps form the basis for the exercise of long-arm jurisdiction, it simply may not be maintained that the mere act of dropping a letter into a mailbox in Nebraska in response to a solicited inquiry is, consistent with traditional notions of fair play and justice, enough to establish long-arm jurisdiction. *Compare Kulko v. California Superior Court,* 436 U.S. 84 (1978) [Petitioner's isolated act of purchasing a one-way plane ticket for his child and sending her to California to live with her mother was not enough to justify the invocation of long-arm jurisdiction].

Thus, in the event that this Court concludes that subject matter jurisdiction exists over plaintiff's claims, defendants respectfully submit that the Court should nevertheless decline to exercise personal jurisdiction over these defendants.

IV. FORUM NON CONVENIENS

Finally, even if this Court should decline to dismiss the present action altogether, it is apparent that the case should be transferred to the District Court for the District of Nebraska pursuant to 28 U.S.C. § 1404(a).

While witnesses from Colorado may admittedly be called by plaintiff to testify at trial, it remains undisputed that the preponderance of witnesses and evidence are in Nebraska. Particularly since the plaintiff's orthopedic residency was performed in Nebraska, it is appropriate for this case to be tried in that state. Plaintiff has simply adduced no significant or compelling considerations which would militate against a change of venue to the District Court in Nebraska.

V. LIABILITY INSURANCE HAS NO BEARING ON THE ISSUES RAISED BY DEFENDANTS' MOTION TO DISMISS

By the Court's Order of February 9, 1982, defendants were directed to answer two interrogatories served by plaintiffs on defendants concerning whether the Board of Regents of the University of Nebraska has liability insurance coverage available to it which might pertain to any judgment as might enter in this case on or before February 19, 1982. This date, at the request of defendants, was extended to February 24, 1982. A copy of defendants' An-

swers to Interrogatories and a Verification signed by Richard R. Wood, general counsel to the University of Nebraska, are attached to this Brief.

Defendants have not received any supplemental brief from the plaintiff concerning what impact, if any, this information may have on the claims raised by defendants in their Motion to Dismiss.

Defendants contend, however, that since the Board of Regents of the University of Nebraska has no liability insurance which would cover any judgment in this case up to the amount of $500,000.00 that the State of Nebraska is clearly the real party in interest in this case and that the case should be dismissed as defendants argued in their initial brief, for lack of diversity jurisdiction, due to the bar of the Eleventh Amendment and sovereign immunity. Unlike the Governmental Immunity Act in effect within the State of Colorado, the existence of liability insurance does not cause any automatic waiver of immunity. The Nebraska statute which relates to situations in which liability insurance may be available to cover claims against the State merely provides as follows:

> Whenever a claim or suit against the State is covered by liability insurance, the provisions of the liability insurance policy on defense and settlement shall be applicable notwithstanding any inconsistent provisions of this Act. The Attorney General and the State Claims Board shall cooperate with the insurance company.

Neb. Rev. Stat. 1943 § 81-8,231. This provision does not waive governmental immunity or claims as to which insurance coverage may be available but merely provides that policy provisions concerning the carrier's right to

handle the defense and settlement of such cases shall be governed by the policy of insurance and does not abrogate sovereign immunity otherwise available to the State of Nebraska.

Furthermore, the Board of Regents has no insurance with respect to any claim for which judgment might enter up to the amount of $500,000.00, and thus satisfaction of any judgment up to that amount must come from State funds.

———o———

CONCLUSION

Defendants therefore respectfully submit that this Court should dismiss the present case for lack of subject matter and/or personal jurisdiction. In the alternative, defendants request that the case be transferred to the appropriate forum in Nebraska.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

AMENDED COMPLAINT

Plaintiff, Andrew K. Burt, by and through his attorneys, Hannon, Stutz, Dyer & Miller, amends his previously filed Complaint as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff repeats and realleges Paragraphs 1 through 4 of his Complaint as though fully set forth herein.

2. This Amended Claim is brought pursuant to 42 United States Code, Section 1983. Jurisdiction is vested in this court pursuant to 28 U.S.C., Section 1343.

3. Defendant, Board of Regents of the University of Nebraska, is sued both as a political subdivision and an agency of the State of Nebraska. At all times relevant to this Amended Complaint the Defendant, Board of Regents, was acting pursuant to a grant of authority and under color of the authority of the State of Nebraska.

4. Defendant, John F. Connolly, is sued both in his individual capacity and as an agent of the Board of Regents of the University of Nebraska. At all times relevant to this Complaint, Defendant, Connolly was acting under color of authority of the State of Nebraska.

5. The Plaintiff invokes the ancillary and/or pendant jurisdiction of this court to hear and rule upon all claims related to the Amended Counterclaim.

AMENDED CLAIM FOR RELIEF

1. Plaintiff repeats and realleges Paragraphs 5 through 13 of his Complaint as though fully set forth herein.

2. On or about June 30, 1977, Defendants, Board of Regents of the University of Nebraska and Connolly, both acting by statute, regulation, and custom, under color of law of the State of Nebraska, issued to Plaintiff a Certificate of Residency in Orthopedic Surgery, thus creating a reasonable entitlement on the part of Plaintiff that he could practice his chosen profession free from unreasonable interference by the government.

3. The aforementioned entitlement, that of practicing orthopedic surgery as a medical doctor, is an interest recognized by State law in both the states of Colorado and Nebraska. In each state said license may not be revoked without the due process requirement of a hearing guaranteed to the individual by the 14th Amendment to the United States Constitution.

4. Plaintiff had a legitimate property interest in his Certificate of Residency in Orthopedic Surgery, guaranteed to him by the 14th Amendment to the United States Constitution. Said Certificate of Residency represents his lawful, legitimate and licensed means of making a living.

5. Plaintiff had a legitimate liberty interest in his Certificate of Residency guaranteed to him by the 14th Amendment to the United States Constitution in that said Certificate gave him the freedom to move about the country and practice his occupation free from unreasonable government interference.

6. The actions of Defendants, Connolly and the Board of Regents of the State of Nebraska, acting under color of State Law, amounted to a taking of Plaintiff's license to practice orthopedic surgery; in that Connolly's statements, previously referenced in allegation 11 of Plaintiff's original Complaint, made it impossible, in practical terms, for Plaintiff to practice his profession of orthopedic surgery.

7. The actions of Defendants, Connolly and Board of Regents, amounted to a defacto taking and revoking of Plaintiff's license to practice orthopedic surgery; thus violating Plaintiff's right to procedural due process guaranteed to him by the 14th Amendment to the United States Constitution.

8. The actions of Defendants, Connolly and Board of Regents, seriously injured and damaged the Plaintiff's right to liberty and property guaranted to him by the 14th Amendment to the United States Constitution.

9. As a result of Defendants' actions, Plaintiff is unable to practice his specialty or function as an emergency room physician, Plaintiff has suffered loss of remuneration, profits and business opportunity in the amount of at least $500,000.00.

10. Plaintiff additionally should be awarded punitive damages in the amount of $1,000,000.00 as a result of the malicious nature of both Defendants' conduct.

11. Plaintiff, by statute, is entitled to attorneys' fees.

WHEREFORE, Plaintiff prays the Court for judgment in his behalf and against Defendants jointly and severally as follows:

a. General damages in the amount of at least $1,000,000.00.

b. Special damages in the amount of a least $500,000.00.

c. Punitive damages in the amount of at least $1,000.000.00.

d. Reasonable attorneys' fees as determined by the Court.

e. Costs, disbursements and such other relief as to the Court may seem proper.

Date: June 28, 1982

Respectfully submitted,

HANNON, STUTZ, DYER
& MILLER

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[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title omitted in printing]

PLAINTIFF'S REBUTTAL BRIEF TO
DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
UNDER 42 U.S.C. 1983

I. PRELIMINARY STATEMENT

Plaintiff, in earlier pleadings, stated in detail the facts he alleges as causes of action in his original Complaint and the law pertaining thereto. This brief will address only the issues raised by the following documents:

1. Plaintiff's Amended Complaint alleging a cause of action under 42 U.S.C. 1983.

2. Defendant's Motion to Dismiss Plaintiff's Amended Complaint for Failure to State a Claim upon Which Relief Can be Granted.

3. Defendant's Brief accompanying that Motion.

Attached hereto are the affidavits of Dr. Grant Steffen, President of the combined staff of Swedish Medical Center and Porter Memorial Hospital and that of Dr. Burt. Plaintiff has elected to submit these affidavits so that the court will be aware of the extent of the harm Dr. Connolly has caused Dr. Burt and the realities of licensing of orthopedic surgeons apart from a cursory examination of state licensing statutes. Taken together these affidavits establish: that Dr. Burt spent three long years at a significant salary reduction in order to become an orthopedic surgeon; that Dr. Burt did become an orthopedic surgeon and was duly

licensed as such through a Certificate of Residency signed by Dr. Connolly, that the Certificate of Residency which Dr. Connolly signed functions as a license to practice orthopedic surgery within the custom and practice of the medical profession; and that Dr. Connolly's action wrongfully revoked that license through a malicious libel. The Constitutional manifestations of these facts will be discussed below.

At the outset, Plaintiff submits the universally accepted rule that a Motion to Dismiss for Failure to State a Claim should not be granted unless it clearly appears that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Russo v. Eddington,* 483 F. Supp. 739 (1980), *Conelly v. Gibson,* 355 U.S. 41 (1957), *Kennedy v. Meacham,* 540 F.2d 1057 (10th Cir. 1976).

II. PLAINTIFF'S CAUSE OF ACTION UNDER 42 U.S.C. 1983

Plaintiff's Amended Complaint brings a claim before this court based upon 42 U.S.C. 1983 which states,

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity or other proper proceeding for redress."

The basis of Plaintiff's Complaint is that he was wrongfully and maliciously libeled by Dr. Connolly, acting under color of state law as a representative of The

Board of Regents of the State of Nebraska. Plaintiff further alleges that such slander amounted to a Constitutional deprivation cognizable under 42 U.S.C. 1983 because Plaintiff had a property interest in his Certificate of Residency guaranteed to him by the Fourteenth Amendment to the Constitution and a property interest in his right to make a living as an orthopedic surgeon. Plaintiff further alleges a liberty interest, also guaranteed to him by the Fourteenth Amendment, in his right to travel the country free from defamation in his occupation, Dr. Connolly's actions, Plaintiff alleges, amounted to a constructive taking of his Certificate of Residency to practice orthopedic surgery. Neither the state of Nebraska nor the state of Colorado could have simply revoked Plaintiff's Certificate of Residency, *ex parte*. Dr. Connolly, the same person who signed Plaintiff's Certificate of Residency, however, accomplished that act of taking Plaintiff's Certificate through an October 21, 1980 letter to Presbyterian Denver Hospital, stating among other things,

> "I think he might serve adequately in some field of medicine but not that of orthopedic surgery."

Similar letters were written by Dr. Connelly to several other hospitals.

III. DEFENDANT'S BRIEF

The bulk of Defendant's Brief seems to have misconstrued the gravamen of Plaintiff's complaint, thus sidetracking the Constitutional inquiry which is before the Court. This is not a case of wrongful firing, as the vast majority of cases cited by the Defendant involve.* Plain-

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*[1]Two of the cases cited in Defendants' Brief actually involve defamation cases; more than ten cases cited by Defendant are wrongful firing fact patterns.

tiff does not claim he had a right to a hearing before Dr. Connolly wrote his recommendation. There is no balancing test that must be accomplished by the Court. (Heading III in Defendant's Brief.) Additionally, Plaintiff does not contest that the practice of medicine "is not an ordinary trade" (page 6 of Defendant's Brief). Nor, does this case concern an effort by the Plaintiff to secure the Court's aid in reviewing his academic record (*See Gaspar v. Bruton,* 513 F.2d 843 (10th Cir. 1975) cited on page 7 of Defendant's Brief). Indeed, Plaintiff's academic records while at the University of Nebraska were at least satisfactory, if not laudable. Plaintiff furthermore does not contest the Hospital Board's right to write Dr. Connolly and inquire into Plaintiff's academic qualifications (page 8 of Defendant's Brief). In the same vein, Plaintiff does not contend that his liberty interest, nor his property interest were violated by a mere evaluation by Dr. Connolly. (heading 4(c) of Defendant's Brief)

What Plaintiff does allege, is an intentional abuse of discretion by Dr. Connolly. Defendants, in their Brief state:

> "The Plaintiff here has not alleged facts, if true, which would constitute an abuse of discretion on the part of Defendant, and therefore may not seek judicial review of his scholastic or clinical evaluations."

This is not consistent with allegation 12 of Plaintiff's Complaint,

> "The foregoing statements by Defendant Connolly were false when made and made *with malice on the part of Defendant Connolly* toward Plaintiff."

Quite simply, when Dr. Connolly signed Plaintiff's Certificate of Residency to practice orthopedic surgery on

June 30, 1977 he told all the world, including the Plaintiff, that Plaintiff was competent to practice orthopedic surgery. In spite of this three years later Dr. Connolly completely reversed his position although the two had no contacts during that intervening period. As Plaintiff will prove at trial, Dr. Connolly's acts amounted to bad faith and malice in the nature of *New York Times v. Sullivan,* 376 U.S. 254 (1964), and further constituted a complete abuse of Dr. Connolly's discretion.

IV. PRE *PAUL* FEDERAL CASE LAW

Until the case of *Paul v. Davis,* 424 U.S. 693 (1976), Federal Courts were free to find violations of Constitutional rights in cases similar to the facts alleged herein. In *Warren v. National Association of Secondary Principals,* 357 F. Supp. 1043 (N.D. Texas 1974), for example, a High School student's 1983 action against the National Honor Society and other Defendants was upheld. The student alleged that he had wrongfully been expelled from the Honor Society for drinking a beer in a Pizza Hut. Citing *Board of Regents v. Roth,* 408 U.S. 564 (1972), the Court found a liberty interest in Plaintiff's "good name, reputation, honor and integrity," at 1040(a). Similarly, in *Tucker v. Duncan,* 499 F.2d 963 (4th Cir. 1974), police officers were held liable to Plaintiff for unlawful arrest and use of unlawful force, essentially simple state law tort action.

In 1971, the Supreme Court, in *Wisconsin v. Constantinue,* 400 U.S. 433 (1971) struck down a Wisconsin statute which allowed the Chief of Police to *ex parte* place certain persons on a list specifying them as "known drinkers". The Court, in striking down the statute, found

that the Plaintiff had a constitutional interest in her reputation. Quoting from the lower court's opinion at 302 F. Supp. 864 the court said:

> "It would be naive not to recognize that such posting or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State Statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and opportunity to present his side of the matter."

Wisconsin v. Constantinue was later distinguished by Justice Rhenquist in *Paul v. Davis* on grounds that the statute involved a revocation of a statutory right to drink alcoholic beverages. This point of distinguishment, was, however, of no concern to the *Constantinue* Court.

> "The only issue presented here is whether the label or characterization given a person by posting though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and opportunity to be heard." (at p. 436)

Clearly, the court's concern was for the good name of the individual rather than a constitutional right to drink alcohol. Even accepting Defendant's interpretation of *Wisconsin v. Constantinue,* it would seem that Dr. Burt's right to practice his chosen field of medicine should rank at least as high on the constitutional scale as Ms. Constantinue's right to consume a Budweiser or stronger alcoholic substance.

V. *PAUL v. DAVIS*

Paul v. Davis, 424 U.S. 693 (1974) marks the most recent case in which the Supreme Court has spoken regarding the plausibility of a defamation type action against state officials under 42 U.S.C., Section 1983. In *Paul*, Plaintiff, Davis, was placed on a list of known "shoplifters" by Defendant Paul, Chief of Police of Louisville, Kentucky. The list, which included Davis's "mugshot" was distributed to area merchants before the Christmas season. Plaintiff happened to be on this shoplifters list due to a prior arrest for shoplifting for which he had pled not guilty and the charges were therefore "filed away by the local court".

Plaintiff was a newspaper photographer and the mug book was circulated to Plaintiff's supervisor at the paper. The supervisor called Plaintiff to his office and demanded an explanation for Plaintiff's appearance on the circular. Plaintiff explained his appearance and no disciplinary action was taken against him at all. Plaintiff, however, brought an action pursuant to 42 U.S.C. 1983. The Court, after a lengthy survey of Fourteenth Amendment and 42 U.S.C. 1983 law held that Davis did not establish a constitutional violation guaranteed to him by the Fourteenth Amendment. Simple defamation, reasoned the court, is simply matter of state tort law.

The factual context of *Paul* is extremely important. Plaintiff was not fired. He alleged no special damages. His claim was purely a libel claim for general damages. The court, apparently mindful of the difficult distinc ion between simple tort actions and constitutional violations, left the door open for defamation suits involving more serious violations of constitutional rights.

"It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." (at p. 710)

"While we have in number of our prior cases pointed out the frequently drastic effect the 'stigma' which may result from defamation by the government in a variety of contexts, this line of case does not establish the proposition that reputation alone, *apart from some more tangible interests, such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause.*" (emphasis supplied at p. 701).

VI. POST *PAUL* FEDERAL COURT DECISIONS

Paul, a five to three decision authored by Justice Rhenquist, has been widely criticized by constitutional scholars. *See Glennan, Constitutional Liberty and Property: Federal Common Law in § 1983:* 51 S.Cal.L Rev. 355; *Monahans. Of "Liberty" and "Property"* 62 Cornell L. Rev. 1977. The so-called "defamation plus" rule of *Paul* leaves open the obvious question as to what or how much "plus" is required in order to state a constitutional claim. Many Federal Courts have interpreted *Paul* very narrowly, allowing a 1983 action whenever the slightest hint of an additional property or liberty interest is alleged. For example, the Seventh Circuit requires the Plaintiff only to show he has lost tangible property within the common sense definition of the term. Thus, in *Kimbrough v. O'Neill,* 575 F.2d 1089 (7th Cir., 1976), Plaintiff's 1983 claim alleging the theft of a ring by a prison official was allowed although Plaintiff's action sounded in common law tort. The Court allowed the claim on the basis that the Fourteenth Amendment protects

property and a prisoner's ring is obviously his property. Similarly, Dr. Burt invested over $40,000.00 in setting up an orthopedic clinic in Vail, which he lost in total due to Dr. Connolly's letter.

In *Fitzgerald v. Mountain Laurel Racing*, 464 F. Supp. 263 (W.D. Pa. 1979), the Court allowed a 1983 action upon a defamation claim in which the Plaintiff clearly could not demonstrate as strong a property or liberty interest as can Dr. Burt. *Fitzgerald*, involved a 1983 action brought by a harness horse racing driver for an allegedly unwarranted suspension of racing privileges at a particular track. Plaintiff could still have continued racing at other tracks, but he was barred from the track at Mountain Laurel. A racing commission directive, however, required the Mountain Laurel track to notify all other Pennsylvania racing tracks of the suspension. The Court found that the Plaintiff had a liberty interest in his reputation when that reputation related to his occupation. Plaintiff was thereby awarded an injunction reinstating his racing privileges at Mountain Laurel Race Track. Referencing the rule of *Paul v. Davis*, the Court said:

> "In the instant case, however, the *impairment of future business opportunities* to the Plaintiff as a result of Defendant's acts has been alleged, and we conclude the likelihood thereof sufficiently proved." (p. 266, emphasis added)

The *Fitzgerald* Court found a liberty interest in merely the likelihood of loss of future business opportunities. Dr. Burt's affidavit, in contrast, demonstrates clear consequential damages flowing from the defamation. Dr. Burt terminated employment in California and invested substantial sums in the Vail clinic. The only reason that

Burt could not enjoy the benefits of this investment was the libel of Dr. Connolly.

In *Safeguard Mutual Insurance Company v. Miller*, 477 F. Supp. 299 (E.D. Pa., 1979), Plaintiff, an insurance company, brought a 1983 action for several claims for relief against employees of the Pennsylvania Insurance Department. All claims sounded in common law tort: trespass, misfeasance, malfeasance and defamation. The Defendants, citing to *Paul v. Davis*, claimed that the Plaintiff's causes of action were not protected by the Fourteenth Amendment due to their common law tort nature. While the Court agreed with the Defendant's characterization, it did not agree that that characterization precluded a constitutional claim. The defamation which was complained of caused a suspension of Plaintiff's insurance license and amounted to a malicious attempt to have the license revoked. Plaintiffs had a right, sanctioned by State Law, the Court stated, to operate in the insurance business, and the unlawful attempt to extinguish that right amounted to a violation of Plaintiff's constitutional rights.

In *Morrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), the Fifth Circuit read *Paul* only to bar "purer reputation claims", those claims not involving any tangible monetary damage. *Morrero* involved an unlawful search and seizure of a jewelry store owned by a corporation controlled solely by the Plaintiff. The local press covered the search on the scene and thanks to the cooperation of the local police and prosecutors issued statements to the press stating that $75,000.00 in stolen property had been recovered from Plaintiff's business. The Plaintiff alleged that the charges were totally false and commenced a 1983 action against the government.

In ruling for the Plaintiff, the Court reviewed *Paul* at length. *Paul,* said the Fifth Circuit, involved a two step reasoning process. First, *Paul* found that reputation alone was not a liberty interest recognized by Federal Law. *Paul* held that liberty interest is applicable only when an individual's reputation is stigmatized in some specific constitutional guarantee or some "more tangible" interest (quoting *Paul* at 700-701). Secondly, said the Fifth Circuit, under Kentucky state law reputation was not a liberty or property interest and thus any harm or injury inflicted could not constitute an unconstitutional deprivation of that interest. Applying that analysis to the facts of *Morrero,* the Fifth Circuit concluded that Morrero stated a claim for at least four reasons, any of which standing *alone* would sanction a 1983 claim: (1) Morrero's claim also involved a Fourth Amendment violation and hence the defamation could be viewed as flowing from a constitutional claim; (2) Florida law, unlike Kentucky law, recognized good will as a "property interest" (for example, under Florida case law good will is compensable as a property loss in a condemnation claim) thus placing Plaintiff's claim within the property realm of the Fourteenth Amendment; (3) Plaintiff's claim for good will was in the more "tangible realm" in that Plaintiff's business, a tangible entity, was harmed; (4) Plaintiff's claim was in the nature of "reputation plus", in that Fourth Amendment rights were violated and thus sanctioned by *Paul* as a "reputation plus" claim.

While Plaintiff herein does not claim a search and seizure violation, he clearly has rights falling within the Courts' second and third categories. Colorado, as does Florida, recognizes an interest in good will. Section 7-60-

109 3(b), C.R.S. 1973, for example, provides that no partner in a partnership shall dispose of the good will of a business without the approval of other partners. Dr. Burt, as in the case of any physician, or any businessman, had a good will asset in his practice of medicine which was not only infringed upon but indeed rendered worthless through the actions of the Defendants.

There is a well established line of cases holding that when the government terminates employment as a result of some action which may be defamatory, a 1983 action will lie, even though the employment is terminable at will. *See Harris v. Havey*, 436 F. Supp. 143 (E.D. Wis. 1977); *Zaccagnini v. Morris*, 470 F. Supp. 1199 (D. Mass. 1979); *Puff v. County of Butler*, 524 F. Supp. 751 (W.D. Pa. 1981); *Calaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976); *Stretten v. Wadsworth*, 537 F.2d 361 (9th Cir. 1976); *McGee v. Draper*, 564 F.2d 902; reheard, 639 F.2d 639 (10th Cir. 1981). Defendant, apparently recognizes this line of cases and, indeed, cites it as the established rule. [See page 12, Brief of Defendant.] *Doe v. United States Civil Service Commission*, 483 F. Supp. 539 (S.D.N.Y. 1980) took that line of cases, one logical step further. *Doe* stands for the proposition that not only termination of employment plus defamation constitutes a 1983 claim, but *foreclosure from possible employment* plus defamation also constitutes a claim under 1983.

In *Doe*, Jane Doe (a pseudonym) applied for employment on the White House Fellowships Commission, a highly coveted position. Extensive interviews were conducted regarding Doe's character and competence. Two of those people interviewed said that Doe had a propensity to steal. Doe was not chosen for the position, allegedly

due to those allegations. Doe thereafter brought a 1983 action against the Civil Service Commission which, among other things, alleged that the Commission's refusal to disclose the identity of the informants, while at the same time refusing to expunge those allegations, violated her right to due process of law.

After reviewing several complicated questions involving the Administrative Procedure Act, the Privacy Act and the Freedom of Information Act, the Court reached the question of *Paul v. Davis*. *Paul*, said the Court, stood for the proposition that mere defamation alone would not constitute a constitutional claim. The Plaintiff in *Doe*, however, claimed more. Foreclosure from possible employment, reasoned the Court, was tantamount to loss of employment and thus within the "defamation plus" rule of *Paul*. The Court quoted *Paul* as sanctioning a 1983 action when:

> "Government'(s) action operated to bestow a badge of disloyalty or infamy, with an intended foreclosure from other employment opportunities."

VII. 10th CIRCUIT CASES

The issue now before the Court has been raised to the Plaintiff's knowledge three times within the 10th Circuit-twice before Judge Kane and once before the 10th Circuit Court of Appeals.

Sorenson v. Zapien, 455 F. Supp. 1207 (D. Colo. 1978) involved a 1983 claim by a prison inmate against a member of his parole board. At Plaintiff's parole hearing the Defendant mentioned that the Plaintiff looked like a man that had been charged with rape and that Plaintiff might actually be that man. Plaintiff consequently brought a

1983 action. Not only did Plaintiff have no tangible property loss or other protected interests, but Judge Kane had difficulty in taking Plaintiff's claim seriously and thereby dismissed it.

> "Plaintiff further submits that his character 'will be duly damaged as a result of the unnecessary statements and intuitive inflamatory derogatory remarks of Defendant(s)'. His convictions for unauthorized distribution of controlled substances, escape and aggravated robbery suggest that his concerns are somewhat eristic." (at p. 1208)

In *Russou v. Eddington*, 483 F. Supp. 739 (D. Colo. 1980), Judge Kane again examined a 1983 defamation claim, this time against the Greeley Police. The Plaintiff, a fired police officer, alleged his employment was terminated because he had engaged in lawful union activities. The claim, in the nature of an unlawful hiring, also involved a subsequent defamation regarding to Plaintiff's possible future employment opportunities. Plaintiff alleged that after he was fired the Chief contacted neighboring law enforcement agencies and advised them that if they wanted to continue having "good relations" with the Greeley Police Department they had better not hire the Plaintiff. Judge Kane had no problem with this claim.

> "Not only did these communications directly interfere with Plaintiff's opportunities to find a job, but they were allegedly backed by Eddington's 'advice' that anyone hiring Plaintiff would no longer have 'good relations' with the Greeley Police Department, *such 'advice' standing alone* would support a Section 1983 claim." (emphasis supplied, at p. 746)

In *McGee v. Draper*, 564 F.2d 902, 639 (10th Cir. 1981), a school teacher in a small Oklahoma town was fired due to allegedly false statements made concerning her lack

of sexual morality. The first time the Tenth Circuit examined the case they reversed the lower court upon the granting of a Motion to Dismiss for Failure to State a Claim. On the remand, the District Court still disallowed Plaintiff's damage claim. On appeal for the second time the Tenth Circuit again remanded the case, this time directing the District Court to allow Plaintiff to prove consequential damages. While *McGee* is clearly within the line of cases establishing a 1983 claim for termination of employment plus defamation, Judge Holloway, writing the opinion of the Court, added by footnote some guidance to the District Courts in ruling upon these types of claims.

> "The requirement of *Paul v. Davis* that reputational harm be entangled with 'some more tangible interests' is thus met when a terminated or non-renewed § 1983 plaintiff can show that the termination at least aggravated his stigmatization. *We do not mean to imply that his is a heavy burden for a plaintiff.* Any termination occurring in an atmosphere where the plaintiff's reputation is at issue should be considered sufficient to meet *Paul's* entanglement requirement. *It should be the state's burden to show that termination in such a context is so removed from the plaintiff's reputational concern that it in no way impacted upon it.*
>
> *Similarly, we should not be interpreted as implying that discharge from employment is the exclusive context in which a 'tangible interest' can be entangled with a plaintiff's liberty interest for Section 1983* purposes." *See,* e.g. Monaghan, *"Of Liberty" and "Property"*, 62 Cornell L.Rev. 405, 432-33 (1977). (Ft. nt. 2 at p. 643)

The passage quoted in "Of Liberty" and "Property" begins "if not overruled, *Paul* should be read as narrowly as possible".

VIII. PLAINTIFF'S PROPERTY INTEREST IN HIS CERTIFICATE OF RESIDENCY

Defendant takes a peculiar position in regards to Plaintiff's Certificate of Residency:

> "It is apparent that Plaintiff's claim of a 'reasonable entitlement' to practice orthopedic surgery is a mere *subjective unilateral expectation*, insufficient to invoke the protection of Due Process Clause of the Fourteenth Amendment." (at p. 6, Defendant's Brief, emphasis added)

One wonders if the University of Nebraska informs its incoming students that upon successful completion of their three year program in orthopedic surgery they will be entitled to a "mere subjective unilateral expectation" of ever using their training.

Citing to the statutory licensing schemes of Colorado and Nebraska, Defendants point out that there is no such thing as a license to practice orthopedic surgery. Since there is no such license, they argue, there can be no entitlement and therefore no Constitutional violation.

It is correct that the state licensing schemes do not recognize a specialty of orthopedic surgery. All medical doctors receive only a general license to practice medicine. Within medical licensing schemes, a general practitioner may thereupon practice any type of medicine he can get a patient to submit to. As the affidavit of Dr. Grant Steffen points out, however, there are controls upon doctors practicing specialties exercised within the profession of medicine, and as such a Certificate of Residency is a defacto license to practice orthopedic surgery. Each hospital certifies whether a medical doctor is capable of performing any particular type of work at that hospi-

tal. If the doctor is capable, he is granted hospital staff privileges. Alternatively, if a doctor is deemed incapable, he is denied staff privileges. This denial of staff privileges is fatal to the careers of most specialists in that most specialties require equipment and ancillary personnel such as anesthesiologists and other specialists that only a hospital can offer. The Certificate of Residency is the main criteria which a hospital examines when deciding to grant or deny privileges of a prospective specialist. As Dr. Steffen explains, Dr. Connolly's complete condemnation of Plaintiff's orthopedic surgery skills in itself would prevent Plaintiff from ever being granted any type of privileges on a reputable hospital staff. The end result is to realistically deprive Plaintiff of the ability to practice orthopedic surgery. Without hospital priveleges one cannot be an orthopedic surgeon.

There are numerous cases standing for the proposition that a state may create an entitlement by other means than a statutory licensing scheme. In *Goldberg v. Kelly*, 397 U.S. 254 (1968), for example, entitlement was created by the state simply through a course of conduct in supplying welfare benefits. In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Court said that 1983 claimants should be allowed to prove an entitlement "in light of the policies and practices of the institution". *See also Bishop v. Wood*, 426 U.S. 341 (1972). The affidavit of Dr. Steffen establishes that there is a defacto licensing scheme regarding orthopedic surgeons and that a Certificate of Residency is the normal means of licensing. Without a Certificate of Residency, a medical doctor cannot function as an orthopedic surgeon. By certifying Dr. Burt as having successfully completed a residency and later condemning his

abilities, Dr. Connolly revoked Plaintiff's defacto license to practice his chosen profession of orthopedic surgery.

IX. THE ISSUE OF FEDERALISM

Throughout Justice Rhenquist's opinion in *Paul v. Davis* runs a concern that Federal Common Law through 42 U.S.C. 1983 might come to preempt State Common Law tort actions whenever any type of action by the State is involved.

> (The Plaintiff) apparently believes that the Fourteenth Amendments Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as a tort feaser. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." (at 693)

This concern is perhaps valid if the Plaintiff has a remedy under the tort law of any particular state. The concern certainly shifts, however, if Plaintiff is left in the position of being clearly wronged without a remedy.

In *Application of Jordan,* 439 F. Supp. 199 (D. W.Va. 1977), Plaintiff was named by a Federal Grand Jury in an indictment as a co-conspirator with a different indicted criminal defendant. Plaintiff himself, however, was never indicted. Plaintiff, who was the commissioner of banking in West Virginia, suffered injury when his name appeared in a Federal Grand Jury indictment. While Plaintiff did not lose his employment nor any other tangible interest that can be shown by Plaintiff herein, he still enjoyed a cause of action under 42 U.S.C. 1983. *Paul v. Davis,* reasoned the Court, involved the usurpation of state tort law. Plaintiff in *Paul* had the option of bringing a claim in

State Court for defamation, but the Grand Jury in Jordan's case was immune from a common law tort suit. Therefore, the concerns in *Paul* did not apply and Plaintiff was allowed to proceed under § 1983 as it was the only possible redress for his injuries.

The rationale of application of *Jordan* is certainly analogous to Dr. Burt's position. Defendant, in a previously filed brief has asserted that both Defendants are immune from lawsuit based upon the Eleventh Amendment. Alternatively, they assert in this Brief that Plaintiff does not assert a claim arising to a constitutional dimension. A ruling in Defendant's favor on both issues would leave Dr. Burt remediless.

It is obviously of the utmost importance that State School Officials act with the highest degree of care and impartiality when passing on a request for recommendation for a former student. A few unfair words in these situations can literally destroy a promising man's career. A dismissal of the 1983 claim and a grant of Eleventh Amendment immunity to government officials in these types of cases would amount to a court blessed absolute immunity and a license for officials in such key positions to maliciously abuse their discretion.

X. CONCLUSION

In order to establish a cause of action under Title 42 U.S.C. 1983, a plaintiff must establish that he was deprived of a right, privilege or immunity "secured by the Constitution and the laws" and that such action was done by a person acting "under color of any statute, ordinance, regulation, custom or usage". There is no dispute that

Defendants were acting under color of state law. The defense raised herein is that Plaintiff was not deprived of any right, privilege or immunity secured by the Constitution. There is ample case law, however, establishing the following theories of liability upon the Defendants pursuant to § 1983.

1. Through the actions of Defendants, Plaintiff suffered a violation of his property rights guaranteed to him by the Fourteenth Amendment in that Plaintiff is able to show actual dollar figure tangible losses of income and property, which amounts to a deprivation of property within the common useage of the term.

2. Through Defendant's actions Plaintiff suffered a violation of his liberty rights guaranteed to him by the Fourteenth Amendment in that Defendant infringed Plaintiff's reputation in his occupational field thereby impairing Plaintiff's past, present and future business opportunities.

3. Through Defendant's actions Plaintiff suffered a violation of his liberty interest guaranteed to him by the Fourteenth Amendment in that Defendant's actions caused Plaintiff infamy and foreclosed possible employment opportunities.

4. Through Defendant's actions Plaintiff suffered a violation of his property interest guaranteed to him by the Fourteenth Amendment in that Colorado Law recognizes good will as a valid property right and Defendant's actions damaged Plaintiff's business good will.

5. Through Defendant's actions Plaintiff suffered a violation of his property interest guaranteed to him by the Fourteenth Amendment in that Plaintiff had a right

to practice his chosen occupation of orthopedic surgery and actions of Defendants amounted to a defacto taking of his Certificate of Residency and his license to practice medicine.

6. Through Defendant's actions Plaintiff suffered a violation of his liberty interest in that he was defamed and even a simple defamation amounts to a constitutional violation when Plaintiff is deprived of any other remedy.

Paul v. Davis, the lead Supreme Court case in this area, while holding that defamation was not a constitutional violation standing alone, left to the discretion of the lower Federal Courts to find constitutional violations in a variety of situations including facts similar to the Plaintiff's claim. The Tenth Circuit has already pronounced that prospective 1983 plaintiffs shall not have a heavy burden in establishing constitutional violations in defamation actions. The Court therefore should follow the Tenth Circuit's lead, interpret *Paul v. Davis* narrowly, and allow Dr. Burt's claim.

Respectfully submitted,

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[Certificate of Mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title omitted in printing]

AFFIDAVIT OF DR. GRANT STEFFEN

My name is Dr. Grant Steffen. I am president of the combined staff of Swedish Medical Center and Porter Memorial Hospital. I am familiar with the general practices of granting of hospital staff privileges within the medical profession. To my knowledge, I do not know any of the parties involved in this lawsuit.

Medical doctors receive only a general license to practice medicine. There are certain informal controls, however, which the profession exercises to assure that only those medical doctors who are qualified to perform certain tasks are allowed to perform those tasks. As an extreme example, within state licensing schemes, a general medical practitioner is licensed to perform brain surgery. While he may be licensed to do so, he probably is not competent to do so. In this area, hospital staff privileges play a major role. While it is theoretically possible to perform brain surgery in a doctor's back office, it is not practicably feasible. In order to perform work required in most specialties one needs the privileges of the use of facilities of a hospital. Hospitals then exercise their own controls on who they allow to practice the specialty within their facilities. For all practical purposes, if a specialist, at least in surgery, cannot receive hospital privileges, he cannot practice his specialty.

When a medical doctor applies for staff privileges in most hospitals, the hospital performs a search of the doc

tor's credentials. One of the major credentials a doctor must have is a Certificate of Residency in a particular specialty. Usually a doctor presents a hospital he is applying to with a Certificate of Residency from a teaching institution and that hospital then seeks to confirm the residency with the teaching institution.

Attached to this Affidavit is a letter dated October 21, 1980 signed by a Dr. John E. Connolly, referencing a Dr. Kelly Burt. I can say that based upon this letter and this alone, Dr. Burt would not have been given staff privileges upon a hospital staff which I headed. The statement that he is not qualified to practice orthopedic surgery, coming from the Chairman of his Residency Program, would probably be enough in itself to prohibit Dr. Burt's appointment on any reputable hospital staff.

/s/ Dr. Grant Steffen

[Subscription omitted in printing]

[Attachment to Affidavit of Dr. Grant Steffen (letter of October 21, 1980 signed by John F. Connolly) is reproduced at p. 37 of this Joint Appendix.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-1850

[Title omitted in printing]

AFFIDAVIT OF ANDREW K. BURT

My name is Andrew K. Burt. I am the Plaintiff in this case.

I received a Bachelor of Arts from Nebraska State University in 1965. I next went to medical school at the University of Nebraska between the years 1965 and 1969, the year I graduated. I then spent a year of residency as a surgical intern at Queen's Hospital in Honolulu, Hawaii. The next two years I spent as a Flight Surgeon in the military, stationed in Vietnam. Upon discharge from the service I returned to Nebraska where I worked at Lincoln General Hospital and Lutheran Hospital, and practiced general medicine in Loup City, Nebraska. In Loup City I was making in excess of $50,000.00 per year, but I decided that surgery is what I really enjoyed doing. I decided to go to Emmanuel Hospital in Portland where, after a year, I received a certificate of residency in General Surgery. From there I spent three years as a resident in orthopedic surgery at the University of Nebraska. During my entire time spent as a resident I received roughly $12,000.00 per year in compensation.

Dr. John F. Connolly headed the Orthopedic Surgery program at the University of Nebraska. As such, I took many courses from him. I would describe my work at the University of Nebraska in orthopedic surgery as average. I passed every course which was required, including several courses from Dr. Connolly. The only grades given druing my entire residency were on a pass/fail basis. Although at least two people during my term of residency were asked to resign from the program, I completed the residency. At that time, I received a Certificate of Residency from the University of Nebraska, signed by Dr. Connolly in 1977.

After graduating from the University of Nebraska in Orthopedic Surgery, I took a job with the Western Physi-

cians Medical Group in Alameda, California. My salary was in the neighborhood of $60,000.00 per year. My responsibilities, however, were mainly in the area of primary care.

I had a strong desire to work in the field of Orthopedic Surgery, as I had invested several years into training for the field and it was plainly what I wanted to do. I decided that Vail, Colorado would be an ideal place to practice orthopedic surgery.

I quit my job in California and moved to the Vail area. I invested over $40,000,00 out of pocket costs in setting up a practice. To my surprise, however, I was denied staff privileges at Vail Hospital. This made it almost impossible to practice orthopedic surgery as a surgeon obviously needs hospital privileges in order to practice. There was one remaining hospital in the area, however, St. Vincent's at Leadville, Colorado. I also applied to St. Vincent's but my privileges were denied.

I was told by both hospitals that I had otherwise excellent credentials, but that Dr. Connolly who headed the Orthopedic Surgery program where I was a resident had said I was absolutely unqualified to practice in the field. As such, neither hospital would allow me anything but consulting privileges and surgical assistance of another doctor.

As I was unable to practice in the Vail area, but as I had already come to Colorado, I decided to move to Denver. There, I ran into the same problems that I had in Vail. I was denied privileges at St. Anthony's Hospital and at Denver Presbyterian. Finally, after a lengthy hearing of which I accrued substantial attorneys' fees, I

was granted emergency room privileges at a Denver hospital. While this job paid the bills, I could have done emergency room work upon my graduation from medical school. In short, Dr. Connolly's actions made it impossible for me to practice orthopedic surgery.

After I spent awhile in Colorado, I became discouraged and decided that the best I could do was reclaim my old position. I reapplied at Western Physician's Medical Group in California and was reaccepted. I hold that position to this day.

What I find impossible to understand is that if Dr. Connolly found me completely incapable to practice orthopedic surgery, why did he pass me in every course, and why was I allowed to graduate and issued a Certificate of Residency. I spent three years of my life earning low salary and working long hours to become an Orthopedic Surgeon. Dr. Connolly knowingly allowed me to spend those years in preparation for my career, and later took that career away.

/s/ Andrew K. Burt

[Subscription omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title Omitted in printing]

PLAINTIFF'S REBUTTAL
BRIEF TO
DEFENDANT'S ORAL ARGUMENT

I. PRELIMINARY STATEMENT

On September 20, 1982, on oral argument upon Defendant's Motion to Dismiss, counsel for the Defendants cited approximately seventeen cases which, until that time, had not been previously briefed nor supplied to counsel for the Plaintiff, all cases purportedly speaking to one of the following defenses upon Plaintiff's claim under 42 U.S.C. Sec. 1983.

1) Plaintiff's claim against Defendant, Board of Regents, under 42 U.S.C. Sec. 1983 is barred by the Eleventh Amendment to the United States Constitution.

2) Plaintiff's claim under 42 U.S.C. Sec. 1983 against Defendant, Board of Regents, is barred in that the Board of Regents is not a person within the meaning of 42 U.S.C. Sec. 1983.

3) Plaintiff's claim under 42 U.S.C. Sec. 1983 against Defendant, Connolly, is barred in that Connolly's actions were performed in his official capacity and as such both he and the Board of Regents are entitled to an Eleventh Amendment immunity, in that the Board of Regents and State of Nebraska are the real parties in interest.

Pursuant to the court's ruling this brief will address these points and other new arguments raised during oral argument.

II. PLAINTIFF'S 42 U.S.C. Sec. 1983 CLAIM AGAINST THE BOARD OF REGENTS

Counsel for the Defendant cited several cases where the state itself was held not to be a person within the meaning of 42 U.S.C. Sec. 1983. *Aubochon v. State,* 631 F.2d 581 (8th Cir. 1980), *Prostrollo v. University of South Dakota,* 507 F.2d 775 (8th Cir. 1974), *Avis v. Mangun,* 450 F.2d 932 (2nd Cir. 1971). Alternatively, counsel cited several cases where the State was found to be a "person" under the language of 42 U.S.C. 1983, but was still dismissed from the lawsuit pursuant to the Eleventh Amendment. Bickley v. University of Maryland. 527 F. Supp. 174 (D. Mar. 1981), LaCompte v. University of Houston, 535 F. Supp. 317 (S.D. Tex. 1982), Vaugh v. Board of Regents, 504 F. Supp. 1349 (E.D. of Cal. 1981). This issue, as it pertains to Plaintiff's claim herein, is entirely academic. It is Plaintiff's contention that the Board of Regents of the State of Nebraska is not an arm of the State, but a separate political entity. Therefore, the Eleventh Amendment. as the cases cited by Plaintiff in his previous brief establish, does not apply to the Board of Regents of the State of Nebraska. Plaintiff's claim pursuant to 42 U.S.C. Sec. 1983 neither adds nor takes away from the concerns regarding the Eleventh Amendment previously briefed. As such, Plaintiff stands on his earlier assertion that the Eleventh Amendment does not bar any of Plaintiff's claims.

III. PLAINTIFF'S 42 U.S.C. 1983 CLAIM AGAINST DEFENDANT CONNOLLY

During oral argument counsel for Defendant cited several cases establishing that when a government official

is a nominal defendant in a suit for damages, but the action is really against the State because the demand is for State money or property, such suit is barred by the Eleventh Amendment. This principal, the rule of *Ford v. Dept. of Treasury of Indiana*, 323 U.S. 459 (1945) is well-established. *See* NAHMOD *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION* (1970) at 140. To apply this rule to the facts herein, however, would be a gross misapplication of the *Ford* case. Dr. Connolly has been sued in his individual capacity and Dr. Connolly is the party who has committed the wrong. It is axiomatic to state that an individual, whether acting within the scope of an agency relationship, or acting outside the scope of an agency relationship, is responsible for his own torts. DOOLEY *MODERN TORT LAW* (1980) at 356. Plaintiff's claim, sounding in defamation, is mainly a complaint against Connolly himself while he was acting in his official capacity for the Board of Regents. *Schueler v. Rhodes*, 416 U.S. 232 (1974), a case arising out of the Kent State incident, is directly on point. In *Schueler* the personal representative of the students who were killed during the Kent State shootings brought an action against the Governor of Ohio the Adjutant General and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the President of Kent State University pursuant to 42 U.S.C. 1983. The district court dismissed the complaint on the grounds that the named individuals were, in substance and effect, the State of Ohio and the claim was therefore barred by the Eleventh Amendment. The U.S. Supreme Court, however, reversed and remanded the case to the District Court for further proceedings. The named defendants, said the Court, were

alleged to have "intentionally, recklessly, wilfully and wantonly caused an unnecessary deployment of the Ohio National Guard" and, in the same manner, personally ordered the Guard members to perform allegedly illegal actions which caused the death of Plaintiff's decedents. While the Eleventh Amendment bars suits against the States and applies when the State is the real party in interest, it cannot be used as a shield for a state official confronted by a claim that he has deprived another of a federal right under color of state law. Quoting from *Ex parte Young* 209 U.S. 123 (1908) the court said that when a state official acts under color of state law in a manner violative of the Constitution he,

> "comes into conflict with a superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected ***in his person*** to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *id* at 159-160.

The fact that the Nebraska Board of Regents may or may not carry liability insurance covering the actions of Dr. Connolly, or may or may not themselves indemnify Dr. Connolly for any damages incurred in relation to this law suit bears no consequence. This rationale has been advanced in a number of cases and resoundingly rejected. *See Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) As stated by Professor Lawrence Tribe:

> "A state should not be able to turn a purely intramural arrangement with its officers to an extension of sovereign immunity." L. Tribe *American Constitutional Law* (1978) at 132

The purpose of liability insurance is not only to indemnify state officials, but also to provide a reliable source of re-

covery for injured parties with meritorious claims. It is entirely incongruous to argue that the state, by creating a fund to compensate victims, has somehow extended sovereign immunity to state employees so as to deny payment of the insurance to the class of beneficiaries the fund was created to benefit. *See Palmer v. Pen/Ohio Road Materials, Inc.*, 470 F. Supp. 1199 (W.D. Pa. 1979).

IV. LONG ARM JURISDICTION

In that, as far as counsel for Plaintiff could discern, Defendants have changed their position regarding long arm jurisdiction, counsel for Plaintiff would interpret the Court's September 20th direction as allowing comment regarding this Court's *in personam* jurisdiction pursuant to C.R.S. 13-1-124, 1973 as amended. Defendants' brief takes the position that Plaintiff must establish not only that Defendant committed a tort within the State of Colorado, but additionally that Defendant transacted business within this state. At oral argument on the 20th, counsel retreated from that position, admitting that Defendant committed a tort in Colorado, but alternatively claiming that Plaintiff must show certain "minimum contacts" in accordance with the substantial fairness test of *McGee v. International Life Ins. Co.*, 355 U.S. 220.

Neither of Defendants' contentions are correct. *Texair Flyers, Inc. v. District Ct. 1st Jud. District*, 506 P.2d 367 (1973) is directly on point. In *Texair*, Colorado Plaintiffs brought a wrongful death action against a corporation which gave flight instruction, rented and chartered aircraft solely within the state of Texas. The aircraft in question was chartered in Texas, but crashed in Colorado killing Plaintiff's decedents. Plaintiffs claimed Texair

was negligent in inspecting the aircraft and entrusting it to an untrained pilot.

Defendants challenged *in personam* jurisdiction, but the Supreme Court upheld, stating that while the actions of Texair were accomplished in Texas, the crash occurred in Colorado, thus bringing the Defendants within C.R.S. 13-1-124(b) "the commission of a tortious act within the state." Addressing the question of minimum contacts the court specifically rejected the arguments that any minimum contacts need be shown. Citing the following language from *Newman v. Fleming*, 331 F. Supp. 973 as controlling, the Court said:

> "the minimum contacts requirement does not have to be read into the language of 'commits a tortious act or omission within the state'. Where a non-resident enters a state and commits a tort no showing of continuous activity in the jurisdiction is required. Jurisdiction is sustained by the commission of a single tort." *id* at 370

While the application of the minimum contacts test to the facts of this case is totally unnecessary, Defendants, at any rate, do meet the requirement of minimum contacts pursuant to *McGee*. Colorado courts have interpreted the minimum contacts test as a showing that Defendants have "purposely availed themselves of the privilege of conducting activities in the form state" which seems to be mainly a test of foreseeability. *Lichina v. Futura, Inc.*, 260 F. Supp. 252 (D. 1966). While Dr. Connolly's recommendation was certainly solicited from Colorado, a libel from Dr. Connolly was not. Connolly clearly had the knowledge and intent that his defamation of Dr. Burt would have effects in Colorado, thus meeting the test. The Board of Regents of Nebraska on the other hand, certain-

ly could foresee that a number of its students would enter a neighboring state upon graduation and therefore could personally foresee being subject to the jurisdiction of the Colorado courts.

HANNON, STUTZ, DYER & MILLER

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title omitted in printing]

MEMORANDUM OPINION AND ORDER

This case is before me upon motions to quash service and dismiss. The action has been commenced by a doctor presently domiciled in the state of California against the Regents of the University of Nebraska and a professor on the University of Nebraska faculty, who is also chairman of the Department of Orthopedic Surgery. The basis for the action is a letter written by Dr. Connolly, the professor, to the Director of Medical Education at Denver's Presbyterian Hospital.

Dr. Connolly's letter states that the Plaintiff has "not been recommended for Board eligibility." It is Plaintiff's theory that publication of this letter results in defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty rights protected by the federal constitution.

Defendants seek dismissal of the complaint upon grounds of immunity and upon lack of *in personam* juristion. The Regents claim to be an agency of the state of Nebraska protected by the eleventh amendment. Dr. Connolly claims the same immunity, stating he was acting, in this case, as the state's alter ego. Both Defendants further claim their minimal contacts with the state of Colorado render suit in this district an impediment to their due process rights.

Plaintiff counters these arguments first by claiming he would be without redress if the eleventh amendment

were applied. He further argues Nebraska law would deny his right to sue these Defendants on his defamation claims.[1]

It seems clear to me, first, that whether the Regents are an agency of the state of Nebraska is principally dependent upon the state law. *Hamilton Mfg. Co v. Trustees of State Colleges,* 356 F.2d 599 (10th Cir. 1966). Since the question of whether the Regents are an agency of the state of Nebraska has been answered affirmatively, *Catania v. University of Nebraska,* 282 N.W.2d 27 (Neb. 1979), the only remaining question as far as the Regents are concerned is whether the eleventh amendment immunity applies in all respects to the claims raised against them here. That question also must be answered affirmatively. *United Carolina Bank v. Regents Stephen F. Austin State University, et al.,* 665 F.2d 553 (5th Cir. 1982); *Lecompt v. University of Houston System, et al.,* 535 F. Supp. 317 (S.D. Tex. 1982); *Harris v. Arizona Board of Regents, et al.,* 528 F. Supp. 987 (D. Ariz. 1981); *Beckley v. University of Maryland, et al.,* 527 F. Supp. 174 (D. Md. 1981). It is thus evident the Defendant Regents are immune to this action, and the complaint against them must be dismissed.

As far as Dr. Connolly is concerned, I am loath at this moment to say he is vested with eleventh amendment immunity for the simple reason the amended complaint cannot be read only as the Defendant suggests. Taking the averments pertinent to Dr. Connolly in a light most favorable to the Plaintiff, I must conclude there are in-

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[1]Neither ground appears to me to be a valid basis for extending jurisdiction. *See United Carolina Bank v. Regents,* 655 F.2d 553 (5th Cir. 1982).

dications that recovery is sought against Dr. Connolly for his individual acts that would not be in the scope of his acting and for the state. Hence, were he otherwise subject to unqualified immunity as the state's alter ego, there is a sufficient claim against Dr. Connolly to get the Plaintiff past the eleventh amendment. Notwithstanding, the complaint against him should be dismissed for other reasons.

Dr. Connolly has moved to dismiss on Rule 12(b)(4) and (5) grounds. I believe the motion leads to the question of whether the case should be dismissed for lack of *in personam* jurisdiction. *Federal National Bank & Trust Co. v. Moore*, 412 F. Supp. 644 (D. Okla. 1976).

In this case I have considered whether Dr. Connolly ought to be made to defend this action in Colorado. It is clear that if a tort of defamation was committed, the publication element of that tort occurred here in Colorado, thus technically bringing this action within the reach of Colorado's long-arm statute, 1973 Colo. Rev. Stat. § 13-1-124 (1)(b). However, that statute cannot be read in a vacuum, and the due process clause requires certain "minimum contacts." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

As established in *International Shoe*, insufficient contacts offend "traditional notions of fair play and substantial justice." *Id.* at 316. The standard is whether the Defendant could reasonably anticipate being hailed into court in this forum. *Le Manufacture Francaise v. District Court*, 620 P.2d 1040 (1980), *citing, inter alia*, *Worldwide Volkswagen v. Woodson*, 444 U.S. 286 (1980). I cannot conceive the thought a university professor, writing in response to a request for a recommendation con-

cerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Further, I find that it is more reasonable in this action to quash service and dismiss the complaint because I cannot see that this action can continue in federal court. *Sykes v. Beal*, 392 F. Supp. 1089 (D. Conn. 1975). Moreover, even if it were to continue, I do not believe this is the proper forum. Courts generally consider, among other factors, the interest of the state in providing a forum for its residents and the convenience of the parties. As the Plaintiff is no longer even a Colorado resident, he can as easily bring whatever action he might have against Dr. Connolly in Nebraska. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted, and the complaint and cause of action are dismissed. Each party shall pay his or its own costs.

DATED at Denver, Colorado, this 1st day of October, 1982.

BY THE COURT:

/s/ John P. Moore, Judge
United States District Court

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 82-2378

ANDREW K. BURT,

Plaintiff-Appellant,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado

(D.C. No. Civ. 81-JM-1850)

F. James Donnelly of Hannon, Stutz, Dyer & Miller (Robert J. Dyer III, with him on the brief), Denver, Colorado, for Plaintiff-Appellant.

Thomas L. Roberts of Pryor, Carney and Johnson, P.C. (Susan T. Smith, with him on the brief), Englewood Colorado, for Defendants-Appellees.

Before SEYMOUR, and SETH, Circuit Judges, and ANDERSON,* District Judge.

SEYMOUR, Circuit Judge.

Andrew K. Burt, a Colorado resident at the time this action was filed, brought suit against the Board of Regents of the University of Nebraska and John F. Connolly, Chairman of the Department of Orthopedic Surgery at the University. Dr. Burt, a medical doctor, had completed a residency program in orthopedic surgery un-

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*Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.

der Dr. Connolly at the University. Dr. Burt subsequently applied for staff privileges at several Colorado hospitals, which directed inquiries to Dr. Connolly about Dr. Burt's orthopedic residency and general medical competence. Dr. Connolly responded with a very unfavorable letter and Dr. Burt was denied staff privileges. Dr. Burt filed this suit seeking damages for defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty interests protected by the United States Constitution. The district court granted defendants' motions to dismiss, ruling that the Board of Regents was immune under the Eleventh Amendment, and that the court did not have personal jurisdiction over Dr. Connolly. Dr. Burt appeals the jurisdictional issue, and we reverse.[1]

Dr. Burt alleges in his complaint that the statements by Dr. Connolly were false, willful and wanton, made with malice, and published in Colorado. He further alleges that as a result of these statements he was unable to practice medicine in Colorado. Dr. Burt asserts that the court has personal jurisdiction over Dr. Connolly pursuant to Colorado's long-arm statute,[2] which provides in per-

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[1] Dr. Burt does not appeal the district court's ruling that the Board was immune. As an alternative ground for affirming the dismissal as to him, Dr. Connolly urges on appeal that he also is immune under the Eleventh Amendment. In addition, he contends that Nebraska is a more convenient forum for this action. These issues were not the basis for the district court's disposition and we do not address them here. Dr. Connolly is of course free to present these arguments to the district court on remand.

[2] In diversity cases, the federal district court's jurisdiction is co-extensive with that of the state courts. See Fed. R. Civ. P. 4(e).

tinent part:

> "Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> . . .
>
> The commission of a tortious act within this state. . . ."

Colo. Rev. Stat. § 13-1-124(b) (1973).

In response, Dr. Connolly filed an affidavit asserting that he is a resident of Nebraska and that he has never done business of any kind in Colorado. Dr. Connolly further states that he owns no property in Colorado and was never physically present in Colorado in connection with the claim asserted by Dr. Burt.

The Colorado long-arm statute was intended to extend the jurisdiction of the Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution. *Behagen v. Amateur Basketball Association of America*, 744 F.2d 731, 733 (10th Cir. 1984). In this case the district court concluded that the action was technically within the reach of the long-arm statute because the alleged tort of defamation occurred in Colorado.[3] The court held, however, that personal jurisdiction over Dr. Connolly was precluded by the requirements of federal due process because he lacked sufficient minimum contacts with the forum state.

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[3] "The tort of libel is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1479 (1984) (citation omitted).

Subsequent to the district court's decision below, the Supreme Court decided *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984), and *Calder v. Jones*, 104 S. Ct. 1482 (1984). We believe these two cases require us to reverse the district court's conclusion in this case.

The Court in both *Keeton* and *Calder* recognized that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton*, 104 S. Ct. at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)); *Calder*, 104 S. Ct. at 1486 (same). The plaintiff in *Keeton*, a New York resident, brought a libel action in New Hampshire against Hustler Magazine, an Ohio corporation with its principal place of business in California. The only connection between either the plaintiff or the magazine and New Hampshire was the sale in that state of the allegedly libelous material. In upholding personal jurisdiction, the Court agreed "that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." 104 S. Ct. at 1479. The Court then concluded:

> "'"A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."' *Leeper v. Leeper*, 114 N.H.

> 294, 298, 319 A.2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36, Comment e (1971).
>
> This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."

Id. Under *Keeton*, Colorado has a significant interest in the present case.

In *Calder*, a California resident brought a libel suit in California state court against, inter alia, two employees of a national magazine who were residents of Florida and who had prepared the alleged libelous magazine article in Florida. The California Court of Appeals held that personal jurisdiction over the Florida residents was proper. The Supreme Court noted:

> "[T]he [California] court concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."

Calder, 104 S. Ct. at 1485-6 (footnote omitted). The Supreme Court affirmed, approving the "effects" test employed by the California court. *See id.* at 1486 n.6. The Court concluded that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California," *id.* at 1487, and held that "jurisdiction over [the Florida residents] in California is proper because of their intentional conduct in Florida calculated

to cause injury to [the plaintiff] in California," *id.* at 1488.

We believe this analysis is dispositive of the jurisdictional issue in this case. Although the libel in *Calder* was pursuant to a commercial enterprise, whereas here the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state. The Court in *Calder* was unpersuaded by the arguments of the defendant reporter and the defendant editor that they personally had no economic stake in their employer's sales in a distant state.

> "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works . . . ."

Id. at 1487.

Nor are we persuaded by Dr. Connolly's claim that it violates due process to hale him into court in Colorado because the letter was, in effect, solicited by Dr. Burt, who gave Dr. Connolly's name to the hospitals. Dr. Burt solicited a letter of reference; he did not solicit a malicious falsehood. Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his

statements in any state where the libel causes harm to the victim. To the extent that Dr. Connolly's statements damaged Dr. Burt's reputation and his ability to practice his profession, the damage occurred in Colorado.

Accordingly, we conclude that the district court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment is reversed on that ground and remanded for further proceedings.

82-2378—ANDREW K. BURT v. THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY

SETH, Circuit Judge, dissenting:

I must respectfully dissent.

The majority relies entirely on Calder v. Jones, — U.S. —, 52 U.S.L.W. 4349, but in my view we have only half the elements relied on by the Court in *Calder*. There, the opinion places emphasis on the fact that the story concerned what the plaintif did in California. Thus: "The allegedly libelous story concerned the California activities of a California resident." The Court also stated that the "article was drawn from California sources." The Court then stated the two elements:

> "In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California. World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286 . . . ."

The Court so applies the "effects" theory where both "the focal point . . . of the story and of the harm" was in California.

In the case before us the letter was, of course, sent to Colorado but the "focal" point of the story was Nebraska. The letter was about what had taken place in Nebraska not Colorado. The story was certainly not drawn from Colorado sources. The action was initiated by plaintiff. We thus have but half a *Calder*. The opinion in *Calder* quotes and relies on the usual minimum contact cases with no comment or criticism. It states at the outset of the opinion of the defendant:

> "It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California."

The Court in a footnote quoted the exact circulation figures for the issue, 5,292,200 total and 604,431 in California. The Court had stated at the outset that:

> "The article was published in a national magazine with a large circulation in California."

The opinion contains a mixture of the minimum contact facts, minimum contact cases, and the "effects" theory. Thus it should be assumed that the "effects" basis referred to by the Court is operative in the context of the minimum contacts doctrine as pressed in the case therein quoted, World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286. Thus "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *See also* our cases such as Premier Corp. v. Newsom, 620 F.2d 219 (10th Cir.), and Anderson v. Shiflett, 435 F.2d 1036 (10th Cir.), where in a specific jurisdiction case we required the minimum contact. *See also* the unilateral activity case, Han-

son v. Denckla, 357 U.S. 235. The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado. *See also* Anderson v. Shiflett, 435 F.2d 1036 (10th Cir.).

Again, the "story" was about what had taken place in Nebraska not Colorado. The *only* connection or contact the defendant had with Colorado was the letter he sent to the Colorado hospital in response to its request that he express an opinion as to the plaintiff's "medical knowledge, technical proficiency," and other qualifications. The plaintiff acknowledges that defendant had a duty to reply and that the hospital solicited the information. It is apparent that this solicitation can also be attributed to the plaintiff.

Again, the letter in issue was a required answer to the inquiry as to Dr. Burt's performance as an orthopedic resident in Nebraska, thus was not unsolicited or gratuitously made. Instead, the action was initiated by plaintiff. The majority opinion at page 7 of the slip opinion quotes from *Calder* (104 S.Ct. 1482, at 1487), as to the brunt of the injury and impact on respondent. However, the sentence quoted in part continued with "and in which the *National Enquirer* has its largest circulation." The Court then continued:

> "Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article."

"Under these circumstances" thus includes the extent of the circulation in California and thus the contacts of defendants. The traditional cases were quoted following

the above quotation. Again, we have the "contact" ingredient or element of what the Court calls the "impact." It is an impact theory but in a minimum contact context.

The trial court in its evaluation of the facts found that there was no factual basis for *in personam* jurisdiction over the plaintiff. It must be assumed that this included all the elements and thus a determination that the defendant could not anticipate being haled into court in Colorado. The trial court's findings are presumed to be correct. The jurisdictional issue requires and is based on an evaluation of the facts.

Keeton v. Hustler Magazine, Inc., — U.S. —, 52 U.S. L.W. 4346, was decided on the same day as was *Calder*. The contacts aspect was treated at some length. The Court referred to the regular monthly sales of thousands of magazines in New Hampshire and said this "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." Thus there were sufficient "minimum contacts" between defendant and the State to meet due process requirements, quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286. The Court in *Keeton* was concerned with the relationship of the plaintiff to the forum State and the First Amendment issue. However, on the contacts element the Court said of the magazine:

> "But respondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire."

The Court said also that the harm was done in New Hampshire and there is "no justification" for restricting libel actions to defendant's forum, and:

> "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Milliken v. Meyer, 311 U.S. 457, 463.' "

(The Court there quoted *International Shoe*.)

Thus the Court in *Keeton* in what appears to be a specific jurisdictional case or impact case includes the minimum contact doctrine. Again, we must assume that the "impact" theory is appropriate when found in the context of minimum contacts.

As the Court did in *Calder* and *Keeton*, and in our earlier cases, the contacts of the plaintiff with the forum State must be examined. This was again emphasized by the majority and the dissent in Helicopters Nacionales de Colombia v. Hall, — U.S. —, 52 U.S.L.W. 4491, which followed *Keeton* and *Calder*.

In a challenge to *in personam* jurisdiction the plaintiff has the burden of showing the basis for jurisdiction. This is not a heavy burden, but reliance cannot be placed on unsupported allegations in the complaint. These allegations are not taken as true under these circumstances in view of the burden.

In 2 Moore's Federal Practice ¶ 4.41-1[3], at 4-473 (2d ed.), the authors state:

> "On appeal, the trial court's findings on the jurisdictional question are presumptively correct and will be set aside only if clearly erroneous. Even where the trial court reached its decision on the basis of affidavits and other documentary evidence, and did not weight conflicting evidence or evaluate witness credi-

> bility, the standard of review on appeal is the same. The court on appeal will not draw its own inferences and conclusions from the facts in the record."

A footnote quotes our Quarles v. Fuqua Industries, Inc., 504 F.2d 1358 (10th Cir.).

The trial judge's evaluation of the facts developed by the affidavits should be considered as any other fact determination. The weighing of the facts is necessary in the determination of jurisdiction. Kulko v. California Superior Court, 436 U.S. 84.

I would affirm the judgment of the trial court.

MAY TERM—June 17, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Aldon J. Anderson, District Judge*

No. 82-2378

ANDREW K. BURT,

Plaintiff-Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants-Appellees.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by the appellee, John F. Connolly, in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Circuit Judge Barrett voted to grant rehearing.

The Court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, rehearing in banc is denied.

Circuit Judge John P. Moore did not participate.

/s/ Howard K. Phillips, Clerk

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*Of the United States District Court for the District of Utah, sitting by designation.

No. 85-298

Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,
Petitioner,

vs.

ANDREW K. BURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

May Colorado's long-arm statute, C.R.S. § 13-1-124, be applied, consistent with the Fourteenth Amendment to the United States Constitution, to confer *in personam* jurisdiction over a Nebraska resident whose sole contact with the forum state was to respond to a private, unsolicited inquiry about the performance of a former student in a Nebraska orthopedic residency program in light of the petitioner's duty to respond to such inquiries wherever any of his ex-students may choose to reside and seek academic references?

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No. 85-298

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,
Petitioner,

vs.

ANDREW K. BURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 757 F.2d 242 and are reprinted beginning at page 105 of the Joint Appendix ("J.A."). The Memorandum Opinion and Order of the District Court for the District of Colorado, which is not reported, is reproduced at J.A. 101-04.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 20, 1985. A timely petition for rehearing *en banc* was denied on June 17, 1985 (J.A. 117). The petition for a writ of certiorari was filed on August 22, 1985 and granted on December 2, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATUTORY PROVISION INVOLVED

C.R.S. § 13-1-124 (1973 & Cum. Supp. 1985):

> *Jurisdiction of Courts.* (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the State of Colorado, either in person or by an agent, submits such person, and, if a natural person his personal representative to the juris-

diction of the courts of this state concerning any cause of action arising from:

(a) The transaction of any business within the state;

(b) The commission of a tortious act within the state;

(c) The ownership, use, or possession of any real property situated in this state;

(d) Contracting to ensure any person, property, or risk residing or located within this state at the time of contracting; or

(e) The maintenance of a matrimonial domicile within this state with respect to all issues relating to obligations for support to children and spouse in any action for dissolution of marriage, legal separation, declaration of invalidity of marriage, or support of children if one of the parties of the marriage continues without interruption to be domiciled within the state.

———o———

STATEMENT OF THE CASE

This case presents issues involving "specific" *in personam* jurisdiction in the single-act context. The instrumentality which allegedly caused an "effect" within Colorado is a private letter which Dr. Connolly, the petitioner, had a duty to write in response to an unsolicited inquiry concerning the credentials and qualifications of the respondent, Dr. Burt, an ex-student of Dr. Connolly. The inquiry was initiated in Colorado due to Dr. Burt's decision to move there and apply for hospital privileges. The inquiry promised that the response would be held in confidence.

A. Facts Giving Rise to This Controversy.

The respondent, Andrew K. Burt (plaintiff below), a medical doctor, completed a residency in orthopedic surgery at the University of Nebraska Medical School in Omaha, Nebraska in 1977. Several years later, after residing in California, he moved to the State of Colorado with the idea of establishing a practice in orthopedic surgery in a resort-town of Vail. When Dr. Burt applied for staff privileges in orthopedic surgery at Vail Valley Community Hospital through Presbyterian Denver Hospital, an official of the hospital inquired of petitioner John F. Connolly, Chairman of the Department of Orthopedic Surgery and Rehabilitation at the University of Nebraska Medical School, as follows:

> Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgement, personal habits, morals, ethics, etc.
>
> Your answer will be confidential.

J.A. 36.

Dr. Connolly responded to the inquiry as follows:

> In reply to your inquiry about Dr. Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

J.A. 37.

Contending that he was denied staff privileges as a result of Dr. Connolly's letter, Dr. Burt brought suit in the United States District Court for the District of Colorado against the Board of Regents of the University of Nebraska and Dr. Connolly on claims of defamation, breach of contract, interference with prospective advantage, and outrageous conduct. Complaint, J.A. 4-9. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. *Id.* Later, Dr. Burt amended his Complaint to add a claim under 42 U.S.C. § 1983 and invoking federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. Amended Complaint, J.A. 64-67. Dr. Connolly was served with process in Nebraska. Service was had on the Board of Regents by service on its agent also in Nebraska.

The Board of Regents and Dr. Connolly moved to quash summonses and dismiss the Complaint on alternative grounds of lack of *in personam* jurisdiction, Eleventh Amendment immunity, and failure to state a claim upon which relief could be granted. Motion, J.A. 10-14. Dr. Connolly's unchallenged affidavit (J.A. 34-36) establishes that he has no contact with the state of Colorado other than the mailing of the above-quoted letter to Presbyterian Denver Hospital in Denver, Colorado (which oversees Vail Valley Community Hospital) on October 21, 1980. *See also* Memorandum Opinion and Order, J.A. 101. Dr. Connolly was, and remains, a Nebraska resident. He owns no property within the state of Colorado and has transacted no business within the state of Colorado. Connolly Affidavit, J.A. 34-36.

B. The District Court's Ruling

In its Memorandum Opinion and Order (J.A. 101-04) entered on October 1, 1982, the District Court dismissed

the Complaint against the Board of Regents on Eleventh Amendment grounds, and no appeal was taken from that ruling.

The District Court dismissed the Complaint against Dr. Connolly for lack of *in personam* jurisdiction, concluding that although the conduct in question was technically within the reach of the tortious act provision of Colorado's long-arm statute, minimum contacts required for the exercise of ***in personam*** jurisdiction were absent here. Addressing the foreseeability of being haled into a foreign forum under *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the District Court said:

> I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

J.A. 103-04.

C. Proceedings in the Court of Appeals

Dr. Burt appealed the dismissal of his claims against Dr. Connolly to the United States Court of Appeals for the Tenth Circuit. While the appeal was pending, this Court rendered decisions in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) and *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984).

In a split decision (J.A. 105-116), the Court of Appeals, finding *Keeton* and *Calder* controlling, reversed the District Court's dismissal of the Complaint. Writing for the majority, Judge Seymour said:

> Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim.

Burt v. Board of Regents of the University of Nebraska, 757 F.2d 242, 245 (10th Cir. 1985) (hereinafter "*Opinion below*"); J.A. 110-11.

Judge Seth dissented, taking issue with the majority's mechanical application of an "effects" test in defamation cases, pointing out that the Court in *Calder* relied on multiple "elements" in finding minimum contacts, only half of which are present in this case. *Id.*, 757 F.2d at 245; J.A. 111 (Seth, J. dissenting). Focusing on the fact that the unilateral activity of Dr. Burt created the only contact with the state of Colorado in this case, Judge Seth stated:

> The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado.

Id., 757 F.2d at 246; J.A. 113 (Seth, J. dissenting) (citation omitted).

Finally, Judge Seth called into question the majority's presumption of the truthfulness of allegations in Dr. Burt's Complaint in deciding a challenge to personal jurisdiction. *Id.*, 757 F.2d at 247; J.A. 115-16 (Seth, J., dissenting). Judge Seth's dissent pointed out that the trial judge's evaluation and finding of jurisdictional facts should not have been set aside by the Court of Appeals without a finding that the trial court's decision was clearly erroneous. *Id.*

SUMMARY OF ARGUMENT

As a constitutional prerequisite to a federal district court's imposition of jurisdiction over a non-resident by application of a state's long-arm statute, it is essential that the defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).

The constitutional test enunciated by *International Shoe* involves a two-step analysis. First, the defendant must have a constitutionally cognizable contact with the forum (*i.e.,* did he purposely avail himself of the right and privilege of conducting activities in the forum state?). If the answer to this question is "no," the inquiry must end because jurisdiction may not be constitutionally imposed.

Second, if a constitutionally cognizable tie exists between the defendant and the forum, the Court then must determine whether imposition of jurisdiction in the particular circumstances presented will offend traditional notions of fair play and substantial justice. Resolution of the second tier of analysis involves the balancing of various factors, and if resolved in the negative, the Fourteenth Amendment will not permit imposition of jurisdiction.

Petitioner submits that both levels of inquiry in this case must be resolved in the negative, and therefore, the Tenth Circuit Court of Appeals decision must be reversed.

The discharge of an admitted duty through the medium of a private letter response to an unsolicited inquiry generated in a foreign state about an ex-student cannot

constitute a constitutionally cognizable contact with that forum because: (1) Dr. Connolly did not purposely avail himself of any right or privilege of the forum since his response, compelled by a duty, was not truly volitional or intentional, nor did it entail any personal or economic gain; (2) the contact with Colorado in this case emanated solely from the unilateral activity of Dr. Burt in choosing to locate and apply for hospital privileges there; and (3) Dr. Connolly had no reasonable expectatior of being haled into a Colorado tribunal as a result of responding to an unsolicited inquiry when that response was promised to be held in confidence, where he had no other contacts whatsoever with the State of Colorado, and where his response was but one consideration in the calculus of determining Dr. Burt's application for hospital privileges. There being no judicially cognizable tie between petitioner and the State of Colorado, this Court may and should end its inquiry there and reverse the Court of Appeals decision.

Even if it can be said that there was a constitutionally cognizable contact between petitioner and the State of Colorado in this case, imposition of jurisdiction under the particular circumstances presented would offend traditional notions of fair play and substantial justice because: (1) a mere effect in the forum will not sustain jurisdiction if other factors render exercise of jurisdiction unfair or unreasonable; and (2) exercise of jurisdiction here would be unreasonable because the interest of Colorado in redressing alleged wrongs occurring within its boundaries is substantially outweighed by that state's interest in insuring the quality of medical care available within the state.

The Tenth Circuit misread and misapplied *Keeton* and *Calder* in imposing jurisdiction here by ignoring their

dramatic factual and legal dissimilarities from the instant case and in totally failing to address *International Shoe's* required second level of analysis. Concluding that cases involving defamation claims arising from the instrumentality of nationally circulated commercial publications dictate imposition of jurisdiction here simply misses the constitutional boat.

A case previously considered by this Court is most factually similar to and, petitioner submits, dispositive of the instant matter. *See, Pemberton v. Sperandio,* 439 U.S. 812 (1978) (Mem.), in which this Court vacated *State ex rel. Sperandio v. Clymer,* 568 S.W.2d 935 (Mo. 1978) (*"Sperandio I"*) (which found jurisdiction over a non-resident based upon his mailing of a letter into the State of Missouri allegedly causing an effect there) and remanded for reconsideration in light of *Kulko v. California Superior Court,* 436 U.S. 84 (1978).

Upon remand, the Missouri Supreme Court in *State ex rel. Sperandio v. Clymer,* 581 S.W.2d 377 (Mo. 1979) (*"Sperandio II"*), reversed its earlier decision and concluded that a physician's response to an unsolicited letter seeking his opinion on a case could not constitutionally support imposition of jurisdiction upon him despite an alleged "effect" within the State of Missouri.

ARGUMENT: IMPOSITION OF IN PERSONAM JURISDICTION UNDER THE FACTS PRESENTED VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

I. THE CONSTITUTIONAL STANDARD

Colorado's long-arm statute, C.R.S. § 13-1-124 (1973 & Cum. Supp. 1985), in pertinent part, extends the juris-

diction of courts in Colorado (including, for purposes of this case, the Federal District Court sitting within the state[1]) to non-residents of Colorado for all causes of action arising from: "(b) the commission of a tortious act within this state."

Colorado courts have uniformly interpreted the State's long-arm statute to extend the personal jurisdiction of Colorado's courts to the maximum limits permissible under the United States and Colorado constitutions. *E.g., Scheuer v. District Court*, 684 P.2d 249, 250 (Colo. 1984). Conversely, the Colorado "legislature did not intend that the long-arm statute be construed to permit jurisdiction to be asserted when to do so would violate due process of law." *Le Manufacture Francaise v. District Court*, 620 P.2d 1040, 1044 (Colo. 1980).

It is alleged in this case that a letter written by Dr. Connolly in Nebraska has caused injury in Colorado, thus satisfying the "tortious act" provision to invoke long-arm jurisdiction as a threshold matter. *Burt v. Board of Regents of the University of Nebraska*, No. 81-JM-1850, Slip Op. at 3 (D. Colo. October 1, 1982), J.A. 103.

---

[1] For purposes of *in personam* jurisdiction for claims based on state law, the law of the state in which the federal court sits controls, subject to due process guarantees of the United States Constitution. *E.g., Marquest Medical Products, Inc. v. EMDE Corp.*, 496 F. Supp. 1242 (D. Colo. 1980). With respect to the respondent's claim based on 42 U.S.C. § 1983, Fed. R. Civ. P. 4(f) provides that service of process may be made within the territorial limits of the state in which the federal court sits unless a specific statute or rule authorizes service beyond the state's boundaries. *See Howard v. United States*, 126 F.2d 667 (10th Cir.), *cert. denied*, 316 U.S. 699 (1942). No statute providing for nationwide service of process is applicable to respondent's federal law claim.

Dr. Burt does not contend that Dr. Connolly has conducted regular and systematic activities within the State of Colorado. Rather, Dr. Burt seeks to exercise "specific jurisdiction" over Dr. Connolly in a suit allegedly arising out of Dr. Connolly's specific contacts within Colorado. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, 411 n.8 (1984); *compare Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) ("general" jurisdiction based on regular and systematic activities) *with McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) ("specific" jurisdiction in cause of action arising from specific activities).

The critical inquiry is whether the exercise of *in personam* jurisdiction on the basis of the letter written by Dr. Connolly comports with due process of law. *Fleet Leasing Co. v. District Court*, 649 P.2d at 1074 (Colo. 1982). The mere fact of harm in Colorado arising from extra-forum conduct will not automatically justify exercise of jurisdiction. If other factors render jurisdiction unfair under the circumstances, it may not be imposed. *Id.* at 1078.

The modern due process standards governing the assertion of extra-territorial *in personam* jurisdiction over a non-resident defendant are set forth in *International Shoe Co., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and other cases. The well known standard is that defendants must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). While the standard set forth in *International Shoe* represents a relaxation of the doctrine of

strict territoriality of *Pennoyer v. Neff*, 95 U.S. (5 Otto.) 714 (1878):

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Hanson v. Denkla, 357 U.S. 235, 251 (1958).

The standard for deciding questions of *in personam* jurisdiction set forth in *International Shoe* applies equally to individuals and corporations alike. *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977), *quoting International Shoe*, 326 U.S. at 319. Likewise, the minimum contacts analysis now applies to all actions affecting the interests of nonresident defendants whether those actions be *in personam* or *in rem*. *Shaffer v. Heitner*, 433 U.S. at 206.

The minimum contacts standard protects individual liberty interests preserved by the due process clause. *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 & n.10 (1982). It also ensures that the states do not reach out beyond the limits imposed on them by principles of federalism. *World-Wide Volkswagen*, 444 U.S. at 292.

The *International Shoe* standard was recently explicated by this Court in *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). To determine whether the exercise of *in personam* jurisdiction comports with due process, courts must apply a two-step analysis.

First, it must be established that the defendant "purposefully established 'minimum contacts' in the forum

state." *Id.*, 85 L.Ed.2d at 542, citing *International Shoe*, 326 U.S. at 316. If it is found that the defendant has not established minimum contacts with the forum state, i.e. "purposefully availed" himself of conducting activities in the state "in a way that would justify bringing [him] before a [forum state] tribunal," *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977), by voluntarily creating a "substantial connection" with it, *see Burger King*, 85 L.Ed.2d at 540-43, the inquiry ends there. *Id.*, 85 L.Ed.2d at 543.

Second, when "it has been decided that the defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.*, 85 L.Ed.2d at 543, citing *International Shoe*, 326 U.S. at 320. Thus, in the second tier of due process analysis, it is appropriate for courts to weigh other factors such as the burden on the defendant to defend suits in distant forums, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining redress, the shared interest of the several states in furthering fundamental social policies, and others. *Id.*, citing *World-Wide Volkswagen*, 444 U.S. at 292.

With respect to the first level of due process analysis, foreseeability of causing injury within the forum state is not a "'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 85 L.Ed.2d at 542; *World-Wide Volkswagen*, 444 U.S. at 295. Rather, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled

into court there." *Burger King,* 85 L.Ed.2d at 542, *World-Wide Volkswagen,* 444 U.S. at 297.

The first tier of due process analysis necessarily requires that courts look to the particular facts of each case to decide whether the "purposeful availment" requirement has been met. *Kulko v. Superior Court,* 436 U.S. 84, 92 (1978). The minimum contacts test of personal jurisdiction cannot be performed by mechanical application, *Id.,* or by the application of "talismanic" formulas. *Burger King,* 85 L.Ed.2d at 549. Each case must be determined by careful scrutiny of its own particular facts. The Gordian knot of *in personam* jurisdiction may not be cut but must be carefully and constitutionally unravelled in each case.

As demonstrated below, analysis of the first tier of the due process inquiry should result in a finding that Dr. Connolly does not have sufficient minimum contacts with the State of Colorado on which to base the exercise of personal jurisdiction. Even if his reply to the hospital's inquiry regarding Dr. Burt establishes sufficient contacts with the State of Colorado, the second tier of due process inquiry should result in a finding that to exercise jurisdiction in this case would not comport with fair play and substantial justice.

II. DISCHARGE OF AN ADMITTED DUTY TO RESPOND TO AN UNSOLICITED INQUIRY INITIATED BY THE PLAINTIFF IN ANOTHER STATE CANNOT CONSTITUTE A CONSTITUTIONALLY COGNIZABLE CONTACT WITH THE FORUM.

A. The Essential Constitutional Ingredient of Purposeful Availment of The Benefits and Protections of the Laws of the Forum is Absent Here.

As Chairman of the Department of Orthopedic Surgery and Rehabilitation at the University of Nebraska Medical School, Dr. Connolly has the duty to respond candidly to requests for information on his former students coming from hospitals or other institutions wherever his students may be applying for medical staff positions. Connolly Affidavit, J.A. 34-36, ¶¶ 2 & 10-14; Wood Affidavit, J.A. 41, ¶ 24. Dr. Burt not only did not controvert the existence of this duty but affirmatively conceded its existence in his Reply Brief to the Tenth Circuit Court of Appeals. Reply Brief of Appellant at 5, *Burt v. Board of Regents*, 757 F.2d 242 (10th Cir. 1985).

Dr. Connolly's duty results not only from his official position at the University of Nebraska but also from the fact that he is a licensed member of the medical profession which must rely largely on peer review and evaluation to insure that only qualified individuals are permitted to practice. *See, e.g.*, C.R.S. § 12-43.5-101(2) (1985 repl. vol.) (statutorily imposing upon the medical profession the duty to insure high quality health care to the public at the lowest reasonable cost).

Dr. Connolly responded to the hospital inquiry in his official capacity at the University of Nebraska. *See* Connolly Affidavit, J.A. 35, ¶¶ 10 & 11; *see also* Complaint, J.A. 5, ¶ 11. The reply, sent in discharge of Dr. Connolly's duties was thus not gratuitously made. Nor did it involve any commercial transaction or payment, offer, or expectation of any fee or other benefit flowing to Dr. Connolly. Unlike the article written by petitioners in *Calder,* Dr. Connolly's letter had no commercial purpose, and no advantage was derived by Dr. Connolly other than the discharge of an official responsibility. Also unlike *Calder,* this case involves no activity directed at Colorado for the purpose of obtaining information on which the allegedly defamatory letter was based. The letter concerned only Dr. Burt's activities in Nebraska and was based on information, knowledge, and opinions held there.

Generally, to have "purposefully availed" oneself of the "privilege of conducting activities" within a state, one must invoke the benefits and protections of the state's laws. *Kulko,* 436 U.S. at 94; *Hanson v. Denkla,* 357 U.S. at 253. Further, the purposeful availment must be of a type that would justify bringing a non-resident before a foreign tribunal. *See Shaffer v. Heitner,* 433 U.S. 186, 216 (1977).

By making a single reply to an inquiry instigated by the action of Dr. Burt, Dr. Connolly cannot be said to invoke the benefits and protections of Colorado laws. *Id.* The letter written by Dr. Connolly and sent into Colorado creates only a "fortuitous" or "attenuated" contact for which Dr. Connolly should not be haled into the Colorado courts. *Burger King,* 85 L.Ed.2d at 542; *see International Shoe,* 326 U.S. at 317. The foreseeability of litigation in

the forum is substantially diminished where the defendant's contact with the forum state consists only of an isolated act. *Burger King,* 85 L.Ed.2d at 543 n.18; *see World-Wide Volkswagen,* 444 U.S. at 297.

This Court has previously considered a case involving nearly identical issues and substantially similar facts as presented by this case. In 1978, the Missouri Supreme Court decided the case of *State ex rel. Sperandio v. Clymer,* 568 S.W.2d. 936 (Mo. 1978) (*"Sperandio I"*), a suit for medical malpractice against two Missouri physicians and another physician, Dr. Pemberton, who resided in Salt Lake City, Utah. The Complaint alleged that the plaintiff had been injured as a result of improper procedures employed by the Missouri physicians in performing hip surgery on the plaintiff and alleged a civil conspiracy among the defendants to prevent the plaintiff from learning of the malpractice.

One of the Missouri defendants had corresponded by mail with Dr. Pemberton, an authority on the surgical procedure involved. The letter to Dr. Pemberton, which was unsolicited by him, informed him of the diagnosis of the plaintiff's condition and requested Dr. Pemberton's " 'opinion' as to 'what you would consider the most satisfactory treatment.' " *State ex rel. Sperandio v. Clymer,* 581 S.W.2d 377, 378 (Mo. 1979) (*"Sperandio II"*). X-ray pictures were enclosed with the request for Dr. Pemberton's consultation.

Dr. Pemberton responded to the Missouri physician confirming his diagnosis and suggesting procedures to be employed on the particular patient. Dr. Pemberton made marks on the X-rays to indicate surgical steps. The procedure he suggested was used on the patient and resulted in the injuries alleged.

Other than the letter sent to Missouri in response to the Missouri physician's solicitation, Dr. Pemberton had no contacts with the State of Missouri. He had received no fee for his consultation by mail, nor had any fee been offered or requested; his response by letter had been gratuitously made. No physician/patient relationship had been established between Dr. Pemberton and the plaintiff. Nevertheless, the Missouri Supreme Court found that Dr. Pemberton's gratuitous reply established sufficient minimum contacts with Missouri because "(1) Missouri has an interest in securing redress for its citizen . . . who was injured in Missouri; and (2) Dr. Pemberton's acts were performed *for the purpose of causing an effect in Missouri.*" *Sperandio I*, 568 S.W.2d at 936 (emphasis added); *see also Sperandio II*, 581 S.W.2d at 380.

Dr. Pemberton petitioned this Court for a writ of certiorari on the jurisdiction issue, and in a memorandum decision, this Court granted certiorari, vacated the judgment of the Missouri Supreme Court, and remanded the case for further consideration in light of *Kulko v. Superior Court*, 436 U.S. 84 (1978), which this Court had then recently decided. *Pemberton v. Sperandio*, 439 U.S. 812 (1978) (Mem.). On remand, the Missouri Supreme Court reversed its earlier decision. *Sperandio II*, 581 S.W.2d at 377.

In *Sperandio II*, the Missouri Supreme Court discussed the five considerations enunciated in *Kulko* which dictated against the exercise of personal jurisdiction in that case: (1) by agreeing to allow his children to live in California, Kulko could not be said to have purposefully availed himself of the benefits and protections of

California laws; (2) Kulko did not derive any direct financial benefit as a result of his children living in California; (3) no physical injury had resulted to persons or property within California;[2] (4) the claim did not arise from Kulko's commercial transactions, and thus no commercial benefits were sought; and (5) sending a child to California was not a commercial act and connotes no intent to obtain or expectancy of receiving any corresponding benefit that would make the exercise of personal jurisdiction in the forum state fair. *Sperandio II*, 581 S.W.2d at 381-82.

The Missouri Supreme Court found that "the legal similarities and the legal principles embodied [in *Kulko*] are sufficient for us to conclude that under the circumstances here, Dr. Pemberton is not subject to jurisdiction *in personam* in Missouri." *Id.*, 581 S.W.2d at 382. The letter requesting Dr. Pemberton's assistance was unsolicited by him; no commercial or financial benefit was received by Dr. Pemberton, nor was any requested or offered; no commercial transaction was involved; nothing indicated that Dr. Pemberton knew whether his technique was actually used as there was no further correspondence between Dr. Pemberton and the Missouri doctors. *Id.*, 583 S.W.2d at 382.

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2 In *Sperandio*, physical injury to the plaintiff had been alleged, but such injury was still insufficient to make the exercise of personal jurisdiction over Dr. Pemberton "reasonable." *Sperandio II*, 581 S.W.2d at 382 n.5 (applying Restatement (Second) of Conflict of Laws, § 37 (1971).). Here, there has been no physical injury to any person within Colorado. Dr. Burt alleges injury to his property interests (Amended Complaint at ¶¶ 4, 6, 7, and 8, J.A. 65-66), but he does not have sufficient property interest in his reputation to claim that any "property" has been physically injured. *See Paul v. Davis*, 424 U.S. 693, 712 (1976).

Strikingly similar circumstances are found in this case.[3] The letter inquiring of Dr. Burt was unsolicited by Dr. Connolly. Dr. Connolly neither expected nor received any fee for replying to the inquiry. No commercial transaction was involved, and thus no commercial benefits were sought. Finally, no physical injury has resulted to any person or property within Colorado. In short, Dr. Connolly's acts in responding to the inquiry about Dr. Burt connote no intent to obtain or expectancy of receiving any benefit within Colorado that would make the exercise of personal jurisdiction in the forum state fair.

As noted above, in determining whether a defendant has purposefully availed himself of conducting activities within a forum, the critical inquiry is not foreseeability of causing harm within the forum but foreseeability of being haled into court there. The nature and quality of defendant's activities within the forum state must be considered in determining whether as a matter of fact such foreseeability test has been met. *See, Burger King,* 85 L.Ed.2d at 542, 543, n.18; *World-Wide Volkswagen,* 444 U.S. at 297.

It may be appropriate for a Court to consider the instrumentality of the harm in the forum state. *World-Wide Volkswagen,* 444 U.S. at 318 (Blackmun, J. dissenting); *see also, Id.,* at 314 (Marshall, J. dissenting) (where

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[3] Despite the affidavit of Dr. Grant Steffen, J.A. 89, Dr. Connolly had no way of knowing whether a Colorado hospital would deny staff privileges to Dr. Burt based on Dr. Connolly's letter. More than three years had passed between Dr. Burt's completion of the residency program and the inquiry from Colorado, during which time Dr. Burt presumably could have established credentials which would mitigate against the effect of Dr. Connolly's letter.

injury is caused by a defective automobile, the utility of which derives from its mobility); *see also Calder*, 465 U.S. 783 (where a defamatory article is published in a newspaper with a circulation of 600,000 in the forum state). This case does not involve the type of instrumentality which would cause one to foresee being haled into a foreign court.

Here, Dr. Connolly merely replied to an inquiry which was, in effect, solicited by Dr. Burt. The letter of inquiry promised that Dr. Connolly's reply would be kept confidential, J.A. 36, and Dr. Connolly made his reply in the belief that it would be held in confidence. Connolly Affidavit, J.A. 35, ¶ 13.

Furthermore, the District Court found, as a matter of fact, that litigation in a foreign jurisdiction arising from Dr. Connolly's response to a request for a recommendation anywhere in the world his former student may be applying for a job was not reasonably foreseeable by him. J.A. 103-04. This finding is not clearly erroneous and should have been affirmed by the Court of Appeals. *Opinion below*, 757 F.2d at 247, J.A. 115-16 (Seth, J. dissenting); *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir. 1974); 2 J. Moore, *Moore's Federal Practice*, ¶ 4.41-1[3] at 4-473 (2d ed. 1985).

B. The Contact in Question Resulted Solely From The Unilateral Act of The Plaintiff in Choosing To Apply For Hospital Privileges in Colorado.

When Dr. Burt moved to Colorado and applied for staff privileges there, routine inquiry was made into his background. Inquiry letter, J.A. 36. As conceded by

Dr. Burt, Dr. Connolly was duty-bound to respond to the inquiry. In discharge of this duty, Dr. Connolly sent a letter, alleged to have caused injury to Dr. Burt in Colorado, to the hospital to which Dr. Burt was applying for privileges.

Dr. Connolly did not, however, "purposefully avail" himself of the privilege of conducting activities in Colorado because to conclude that he did necessarily presupposes that he was to "structure [his] primary conduct with some minimum assurance as to where that conduct will and will not render him liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Here, there was no choice of whether or not to send information into Colorado in response to the inquiry Dr. Connolly received. Dr. Connolly did not solicit the inquiry, nor did he seek out the Presbyterian Denver Hospital in order purposefully to undermine Dr. Burt's chances of obtaining staff privileges. *Compare Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1492, 79 L.Ed.2d 804 (1984) (finding personal jurisdiction where defendants actively sought out plaintiff and published a libelous article in the state where she resided).

Dr. Connolly has no control over where his ex-student may decide to locate and apply for hospital staff privileges. Dr. Connolly must respond to inquiries concerning Dr. Burt's residency in orthopedics anywhere in the world Dr. Burt may wish to establish a practice. Dr. Connolly was but a passive player in creating contacts with the forum state. It was the unilateral activity of Dr. Burt, not purposeful acts of Dr. Connolly, which created the only contact with Colorado. Dr. Burt's solicitation in Colorado of a letter of reference from Dr. Connolly in Nebraska necessarily drew the response from Dr. Con-

nolly to Colorado. *Opinion below*, 757 F.2d at 246, J.A. 113 (Seth, J. dissenting).

This Court has uniformly recognized the impropriety of exercising personal jurisdiction in forums chosen by the unilateral activity of someone other than the defendant.

In *World-Wide Volkswagen*, this Court held that due process forbids the exercise of personal jurisdiction over an automobile distributor and a dealer whose only contact with the forum state was a customer's decision to drive there, even though the defendants' product caused severe injuries to persons in the forum.

In *Kulko v. Superior Court*, personal jurisdiction in the California Courts could not be exercised over a divorced husband sued for child support payments whose only affiliation with the forum was created by his former spouse's decision to settle there, even though he had acquiesced in his children's decision to live in California which resulted in an "effect" being felt there.

In *Hanson v. Denkla*, personal jurisdiction could not be exercised over a trustee whose only connection with the forum state resulted from the settlor's decision to exercise her power of appointment there.

In *Rush v. Savchuck*, 444 U.S. 320 (1980), the defendant could not be sued in Minnesota just because he was insured by an insurance company that was amenable to suit there, even though Minnesota had an interest in obtaining redress for its resident.

In each of these cases, the fact that the defendants had "no opportunity to 'alleviate the risk of burdensome litigation' " in the forum state was the determinative factor in denying personal jurisdiction. *Burger King*, 85 L.Ed.2d at 542 n.17.

Similarly, in *Premier Corp. v. Newsom*, 620 F.2d 219 (10th Cir. 1980), the Tenth Circuit Court of Appeals upheld the trial court's ruling that defendants did not have sufficient minimum contacts with the State of Colorado to warrant the exercise of personal jurisdiction over them. The *Premier* defendants were physicians, both citizens of South Carolina, who had entered into a purchase and management contract in South Carolina with Premier Corporation whereby cattle bought by defendants were kept and maintained by plaintiffs in Colorado.

After noting that the defendants had never been in Colorado in connection with the transaction, the Court concluded that the fact that the defendants knew that their cattle were maintained in Colorado was not jurisdictionally significant, holding that plaintiff's unilateral activity pursuant to the contract did not give rise to sufficient minimum contacts. The court stated:

> To hold to the contrary would in the instant case mean that the defendants could be required to defend in any one of the fifty states where [plaintiff] chose to maintain the cattle. Such is not our idea of fair play.

Id. at 223. Indeed, in the present case, to find that jurisdiction was properly imposed upon Dr. Connolly would mean that he could be required to defend in any one of the fifty states where one of his ex-students decides to go and ask that a recommendation be sent.

Other courts have also refused to exercise *in personam* jurisdiction in cases when the defendant's connection with the forum is the result of another party's actions. In *Ballard v. Fred E. Rawlins, M.D., Inc.*, 101 Ill.

App. 3d 601, 428 N.E.2d 532 (1981), the Appellate Court of Illinois refused to exercise *in personam* jurisdiction over a Missouri physician who treated patients that resided in Illinois where the treatment provided was always given in Missouri. In *Wright v. Yackley*, 429 F.2d 2897 (9th Cir. 1972), the Ninth Circuit refused to exercise *in personam* jurisdiction over a South Dakota physician who mailed a prescription to his former patient who had moved to Idaho. In *Associated Inns & Rest. Co. v. Development Associates*, 516 F.Supp. 1023 (D.Colo. 1981), the Federal District Court in Colorado refused to exercise *in personam* jurisdiction over a party to hotel management contracts whose only contacts with Colorado resulted from the plaintiff's decision to relocate there, creating the necessity of holding certain business meetings in Colorado between the parties.

Also, courts are disinclined to find personal jurisdiction when an alleged defamatory statement was solicited by the plaintiff or a third party and was not gratuitously initiated by the defendant. *McBreen v. Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976) (a single telephone call initiated by a reporter to defendant attorney was not, in the ordinary course of his affairs, deliberately placed into the stream of commerce and, otherwise, his contacts with the forum state were insufficient to justify exercise of *in personam* jurisdiction by the District Court); *Findlay v. Dethuit*, 86 A.D. 2d 789, 446 N.Y.S.2d 951 (1982) (defendant, a citizen of France, who made a response to a single overseas phone communication from a New York appraisal association was not found to have engaged in the transaction of business within the forum state or to have committed a tortious act within the state.)

As in the foregoing cases, Dr. Connolly is not in a position to alleviate the risk of out-of-state litigation by severing connections with those jurisdictions. Dr. Connolly cannot refrain from establishing the *de minimus* contact with a foreign jurisdiction that has been established in this case, in order to control the risk of out-of-state litigation, without refusing to reply to requests for references from his students. To allow contacts with the forum that have been created as a result of the unilateral activity of Dr. Burt to result in the exercise of personal jurisdiction over Dr. Connolly in this case would be tantamount to appointing each of Dr. Connolly's students as his "agent for service of process" wherever they may decide to travel. *See World-Wide Volkswagen*, 444 U.S. at 296.

III. CONTRARY TO THE TENTH CIRCUIT'S IMPLICIT HOLDING, MERE EFFECT IN THE FORUM IS NOT IPSO FACTO SUFFICIENT TO IMPOSE PERSONAL JURISDICTION.

Mere effect in the forum has never been held to be sufficient, in and of itself, to allow for imposition of personal jurisdiction consistent with the Fourteenth Amendment. *Calder* did not so hold.

In imposing jurisdiction over the reporter and editor in *Calder*, this Court approved of the "effects" test used by the California Court of Appeal, *Calder*, 79 L.Ed.2d at 810 n.6, but in doing so, did not dispense with the *International Shoe* due process analysis expressly incorporated into Restatement (Second) of Conflict of Laws, § 37, the genesis of the "effects" test. That section provides:

> § 37. Causing Effects in State by Act Done Elsewhere.
>
> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects *unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.*

Restatement (Second) of Conflict of Laws § 37 (1971) (emphasis added). The italicized portion of the foregoing test incorporates both tiers of *International Shoe's* minimum contacts analysis.

The California "effects" test derived from the Restatement and approved by this Court in *Calder* thus expressly recognizes that mere effect in the forum will not, alone, support jurisdiction. California has so held: "[t]he mere causing of an 'effect' in California . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be 'unreasonable.'" *Sibley v. Superior Court*, 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322, 325, *cert. denied*, 429 U.S. 826 (1976). *Sibley* held that jurisdiction could not constitutionally be imposed upon a non-resident guarantor of a loan, despite the fact that the effects of failure to perform occurred in the State of California. *Sibley* noted that the non-resident did not purposely avail himself of the privilege of conducting activities in California, would not have derived any economic benefit from his conduct, and although he may reasonably have foreseen that breach of his agreement would have an effect in California, the fact that he did not assume any obligation which he might have sought to enforce in Cali-

fornia against the plaintiff made imposition of jurisdiction unreasonable under the circumstances.

This Court has also previously recognized the due process limitation contained in § 37 of the Restatement. *See, Kulko v. Superior Court,* 436 U.S. 84, 96 (1978) (" . . . the Restatement recognizes that there might be circumstances that would render 'unreasonable' the assertion of jurisdiction over the nonresident defendant.").

The State of Colorado also recognizes that the mere occurrence of an "effect" within its boundaries does not automatically support imposition of jurisdiction. *See, e.g., Fleet Leasing, Inc. v. District Court,* 649 P.2d 1074 (Colo. 1982) (even though tortious conduct initiated in another jurisdiction may cause injury in Colorado and thus bring the defendant within the letter of the long-arm statute, determination must still be made as to whether exercise of *in personam* jurisdiction in the particular case comports with due process of law); *Granite States Volkswagen, Inc. v. District Court,* 177 Colo. 42, 492 P.2d 624 (1972) (jurisdiction refused, prescient of *World-Wide Volkswagen); C.F.H. Enterprises, Inc. v. Heatcool,* 538 F.Supp. 774 (D. Colo. 1982) (mere sending of a report into Colorado allegedly relied upon by plaintiff not a sufficient affiliating circumstance); *Associated Inns & Rest. Co. v. Development Associates,* 516 F.Supp. 1023 (D. Colo. 1981) (mere effect in forum insufficient if defendant did not purposely avail himself of the privilege of conducting activity within the state).

The Tenth Circuit Court of Appeals misread *Calder* by concluding that its "repeated emphasis . . . on the intentional nature of defendants' conduct and its calculated injurious effect in the forum state," *Opinion below,* 757

F.2d at 245, J.A. 110, somehow dictated the result that when an intentional tort is alleged, jurisdictional prerequisites will necessarily be satisfied.

The Tenth Circuit ignored the fact that *Calder*, in adopting the California "effects" test, also necessarily adopted the "unless" exception to it.

Further, the majority below ignored or overlooked the fact that this Court's opinion in *Calder* found that exercise of jurisdiction over the non-residents there was not unreasonable in light of other facts, not the least of which is the fact that the publication for which they wrote had its largest circulation in the forum state. *Calder*, 79 L.Ed. 2d at 812. Numerous other factual dissimilarities between *Calder* and the present case render jurisdiction reasonable in the former. The alleged defamation in *Calder* arrived in California through the instrumentality of a nationally published commercial weekly newspaper, was unsolicited by the plaintiffs, denied by the plaintiffs, drawn from plaintiffs' activities in the forum state, and, produced, in part, from various telephone calls and visits to that state in creaitng the story.

As correctly observed by Judge Seth in his dissenting opinion, 757 F.2d at 245, J.A. 112, *Calder* should be read as adopting the "effects" test "in the context of the minimum contacts doctrine," requiring constitutional analysis of both phases of the *International Shoe* standard. The majority opinion ignored the fact that the inquiry in question was "a required answer . . ., not unsolicited or gratuitously made, [and] . . . initiated by plaintiff." *Opinion below*, 757 F.2d at 246, J.A. 113 (Seth, J., dissenting).

In concluding that its result was dictated by *Calder*, the majority's opinion below ignored *Calder's* reliance on multiple connections between the forum state and the defendants and ignored glaring factual dissimilarities between the two situations.

In summary, *Calder* did not carve out a constitutional black hole in the Fourteenth Amendment by holding that the intentional transmission of an allegedly defamatory message to a foreign state will, alone, allow for constitutional imposition of jurisdiction.[4] To the contrary, under facts far distant from those here presented, *Calder* appropriately applied the "effects" test through recognition of various factors which rendered exercise of jurisdiction over the reporter and editor of the *National Enquirer* constitutionally fair and reasonable under the circumstances presented.

IV. EVEN IF ISSUANCE OF THE LETTER COULD BE SAID TO CONSTITUTE A CONSTITUTIONALLY SUFFICIENT MINIMUM CONTACT, THE FORUM'S PARAMOUNT INTEREST IN MAINTAINING THE QUALITY OF HEALTH CARE WEIGHS AGAINST FINDING COLORADO A FAIR FORUM.

The Tenth Circuit Court of Appeals majority opinion, after concluding that petitioner's letter had an "effect" in Colorado, went no further and failed to address the second tier of inquiry mandated by *International Shoe:* i.e. given

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[4] In addition, the Tenth Circuit failed to appreciate that since Dr. Connolly had a duty to respond to the Colorado inquiry, such response, although perhaps "intentional" in a factual or metaphysical sense, was not in a jurisdictional sense: Dr. Connolly had no choice but to reply.

a constitutionally sufficient contact, does imposition of jurisdiction under the circumstances comport with traditional notions of fair play and substantial justice?

Even if Dr. Connolly's letter is held to constitute a sufficient minimum contact, the circumstances of this case dictate the conclusion that imposition of jurisdiction here would be unreasonable and unfair for the reasons discussed below.

Citing *Keeton*, the majority opinion concluded that "Colorado has a significant interest in the present case." *Opinion below*, 757 F.2d at 244, J.A. 109. A forum's interest in adjudicating a particular dispute only comes into play, however, in the second tier of the due process analysis as part of the balancing test for determination if exercise of personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 85 L.Ed.2d at 543. Here, the Tenth Circuit allowed the tail to wag the dog by finding that an interest of the forum could substitute for a minimum contact. Such has never been the law of this Court. Indeed, a state's interest in providing redress for alleged wrongs committed within its boundaries exists in every case. If that interest, alone, can satsfy the due process requirements of the Fourteenth Amendment, then the second tier of *International Shoe* becomes mere window dressing.

Keeton simply has no bearing upon the present matter. The essential question in *Keeton* was whether the lack of contracts between the plaintiff and the forum could prevent the forum state from exercising jurisdiction. After noting that jurisdiction had previously been upheld in cases in which there were no contacts between the plaintiff and the forum, this Court properly focused on the " 're-

lationship among the defendant, the forum, and the litigation.' " *Keeton,* 79 L.Ed.2d at 798 (emphasis added), quoting *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977). The result in *Keeton* derived from the regular, systematic, and continuous activity of the defendant in the forum state through extensive circulation of a national commercial publication.

Keeton is thus an example of a case involving "general" jurisdiction based upon continuous and systematic activities of the defendant and represents no departure from or extension of prior cases, such as *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Reliance by the Court of Appeals upon *Keeton* was, therefore, misplaced.

In addition, the Tenth Circuit refused to consider the important countervailing interest of the State of Colorado in the quality of medical care available there through unfettered exchange of information regarding health care professionals.

Quite simply, Dr. Burt's completion of a residency program in orthopedic surgery does not, in and of itself, attest to his competency to practice in that specialty. If such were the case, then the Presbyterian Denver Hospital merely needed to have confirmed the bare fact of Dr. Burt's completion of the residency and not to have inquired further concerning "his medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc." Inquiry letter, J.A. 36.

Acquisition of a certificate of residency does not attest to the quality of the graduate's skills beyond acknowledgment that his or her performance must not have been

so poor as to cause dismissal from the residency program. Similar to any certification of graduation, it does not distinguish from those who performed superbly in the program from those whose performances were below average or marginal. In short, the certificate cannot present a complete picture of respondent's experience, qualifications, and competence without further comment and opinion from his instructors, supervisors, and fellow professionals.

The medical profession is self-disciplined to a very substantial degree and charged with a public trust to engage in peer review of its members and to regulate, at least in a mimimal fashion, the expertise of its members.

The medical profession and hospitals are highly regulated by the State of Colorado through various statutory schemes. *See, e.g.*, Colorado Medical Practice Act, C.R.S. §§ 12-36-101, *et seq.* (1985 repl. vol.) and C.R.S. §§ 25-3-110, *et seq.* (1982 repl. vol. & Cum. Supp. 1985).

Even more to the point, the Colorado General Assembly has deemed it the *duty* of the health care profession to discipline and control the practice of health care in Colorado. C.R.S. § 12-43.5-101 (1985 repl. vol.), the legislative declaration to the Colorado peer review statute, provides:

> (1) It is the policy of this state to encourage discipline and control of the practice of health care rendered by physicians by committees made up of physicians licensed to practice in this state. It is the duty of such committees to openly, honestly, and objectively study and review the conduct of practice by members of the profession, including the quality of service and, when appropriate, the length of hospital confinement.
>
> (2) It is the duty of the health care profession to do all things necessary to provide the public with services of proper quality at the lowest reasonable cost.

> To this end, review committees and members thereof should be granted certain immunities relating to their actions within the scope of the official conduct of their responsibilities and should additionally review, discipline, and educate the profession by free, open, and unfettered exercise of professional judgment.

This statute has been liberally construed by the Colorado Supreme Court on more than one occasion. *Posey v. District Court,* 196 Colo. 396, 586 P.2d 36 (1978), interpreting it, held that records of hospital disciplinary actions were immune from discovery under the statutory scheme in a malpractice case brought by a plaintiff against a physician and the hospital at which surgery was performed contending, among other things, that the hospital had negligently retained the defendant physician on its staff. Refusing to be bound by the literal language of the peer review statute (which would not have prevented the discovery sought), the Court construed it to preclude discovery of peer review materials in "any civil action," recognizing that it was "apparent that such [peer review] investigations will be merely perfunctory if the wide-open inquiry envisioned by the statutory scheme is made the subject of discovery." *Id.* at 38. This case recognized the public benefit of "'[c]onstructive professional criticism'" and held that the legislative declaration, quoted above, "clearly expresses the legislature's desire that hospital review committees be allowed to act unfettered by fear of subsequent liability." *Id.*

Colorado's interest in the quality of medical care received a second shot in the arm from the Colorado Supreme Court in *Franco v. District Court,* 641 P.2d 922 (Colo. 1982). In this case, the Court held that the peer review

statute immunized from discovery hospital peer review documents even in a tort case claiming wrongful suspension of hospital privileges brought by the physician under investigation. With the sole exception of a judicial review proceeding provided for in the statute, the Colorado Supreme Court held that hospital peer review records were immune from discovery in any civil action, recognizing that:

> . . . members of the medical profession cannot be expected to initiate or willingly participate in a peer review investigation if their testimony and reports may be subjected to discovery in subsequent civil litigation involving issues far beyond a meaningful judicial review of the committee's action.

Id. at 929. Moreover, the court observed that:

> . . . The statutory peer review process, in our opinion, represents a legislative choice of medical staff candor at the expense of pretrial discovery in any lawsuit not involving a judicial review of the committee's recommendations and resulting disciplinary action by the hospital's governing board.

Id. at 929. The Court characterized the legislature's choice of absolute immunity from discovery as an attempt "to avoid any chilling effect on the review committee's statutory duty 'to openly, honestly and objectively study and review the conduct of practice by members of the profession.' " *Id.* at 930; *see also, Beth Israel Hosp. v. District Court,* 683 P.2d 343 (Colo. 1984).

Thus, the Colorado peer review statute and decisions from the highest court of this state interpreting it demonstrate beyond dispute that Colorado has not only a significant interest in the quality of health care in this state but a substantial one expressed through promulgation of a

comprehensive legislative scheme to encourage candid observations concerning the competence of physicians unfettered by fear of subsequent liability in a case such as this.

The Tenth Circuit majority opinion completely ignored this interest of the forum which, in the circumstances presented (involving a physician's statement of opinion as to the qualifications of another physician), dramatically outweighs Colorado's interest in providing redress for an alleged libelous statement in the context of a reference request concerning a physician seeking hospital privileges in Colorado. *See Cook v. G. D. Searle & Co., Inc.*, 475 F.Supp. 1166, 1169 (S.D. Ia. 1979) (concluding in a medical malpractice case against non-resident physicians that the forum's "natural interest in the protection of its citizens [was] countered by an interest in their access to medical services wherever needed.").

Indeed, this case presents a situation which may be said to be the other side of the constitutional coin presented in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). One of the prime reasons justifying exercise of jurisdiction in *McGee* was the fact that California had passed a special statute governing disputes between insureds and insurance companies. This legislative expression of state interest was of pivotal importance in imposing jurisdiction in that case. *Id.* at 223-24.

In the present matter, we have exactly the opposite situation: the existence of a state statute which demonstrates a significant state interest is *not* imposing jurisdiction. Colorado has legislatively and judicially expressed an undeniable state interest in encouraging exchange of

information concerning members of the medical profession and has done so to the detriment of some traditional tort remedies.

In this case, therefore, Colorado's state interest in regulating members of the health care profession within its boundaries is a countervailing state interest which substantially outweighs the interest of Colorado in providing tort redress to a physician applicant for hospital privileges against an ex-teacher and fellow physician expressing his opinions as to the professional competence of the former.

———o———

CONCLUSION

For the reasons above discussed, petitioner submits that imposition of jurisdiction upon him under the particular circumstances presented would violate his liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

The only contact that this controversy has with the State of Colorado arose from respondent's unilateral decision to move there and apply for hospital privileges, triggering an unsolicited inquiry to the petitioner from Colorado to which petitioner had a duty to respond. Dr. Connolly's response by private letter was made in the context of a promise of confidentiality. Dr. Connolly simply did not avail himself of the right to conduct any activity in a way that would justify bringing him before a tribunal within the State of Colorado and had no reasonable anticipation of being haled there into a Colorado court merely by expressing his opinion as to the professional qualifi-

cations of a former student. The absence of a constitutionally cognizable contact between petitioner and the Colorado forum precludes exercise of jurisdiction against him there.

Moreover, even if a cognizable affiliation is present, it is both unreasonable and unfair to impose jurisdiction over the petitioner under the circumstances presented because of the particular nature of this controversy and Colorado's public interest in the free exchange of opinions concerning health practitioners in this state.

WHEREFORE, petitioner respectfully requests this Honorable Court to enter its order reversing the Tenth Circuit Court of Appeals opinion in this case and to remand this matter to the District Court with directions to dismiss this case with prejudice and for such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted,

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DATED this 16th day of January, 1986.

(5)

No. 85-298

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

JOHN F. CONNOLLY,
Petitioner,

vs.

ANDREW K. BURT,
Respondent.

SUGGESTION OF MOOTNESS

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No. 85-298

In The

Supreme Court of the United States

October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

vs.

ANDREW K. BURT,

Respondent.

SUGGESTION OF MOOTNESS

Plaintiff, Andrew K. Burt, by and through his attorneys, Stutz, Dyer, Miller & Delap, respectfully moves this Court to remand this case to the United States District Court for the District of Denver with instructions to dismiss the cause as moot, and as grounds therefore shows unto the Court:

1. Defendants were served with a true and correct copy of the Summons & Complaint herein in the United States District Court, District of Colorado, on October 20, 1981.

2. Defendants filed a Motion to Dismiss on jurisdictional grounds on December 14, 1981, but have never filed or served a responsive pleading, and, under F.R.C.P. 41(a)(1), Plaintiff has an automatic right of dismissal until, and unless, a responsive pleading is filed or served by defendant.

3. Defendants never counterclaimed or brought an independent action against Plaintiff, and therefore dismissal of the original action by Plaintiff renders the action moot.

4. The U.S. District Court granted Defendants' Motion to Dismiss on October 1, 1982.

5. Plaintiff appealed the District Court's dismissal on November 12. 1982, alleging that there were not sufficient minimum contacts between Defendants and Colorado to warrant personal jurisdiction in Colorado. The United States Court of Appeals for the Tenth Circuit concluded that the District Court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment was therefore reversed and remanded for further proceedings.

6. Defendants thereafter filed a Petition For Certiorari in the United States Supreme Court on August 22, 1985. This Court accepted Certiorari on December 2, 1985.

7. Plaintiff has exhausted all funds and resources required to pursue this action and has therefore decided to dismiss the suit in its entirety.

8. A Notice of Dismissal, pursuant to F.R.C.P. 41(a)(1), has been filed in the United States District Court for the District of Colorado, Civil Action Number 81 F

1850, on February 18, 1986. A copy of the Notice is attached hereto.

9. Art. III, § 2, of the United States Constitution, limits the jurisdiction of all federal courts to "cases and controversies". Since dismissal of the original action by Plaintiff eliminates any real or substantial dispute affecting the legal rights and obligations of parties having adverse interest, the U.S. Supreme Court does not have jurisdiction to hear this action and it should be dismissed as moot. *Aetna Life Ins. v. Haworth, 300 U.S. 227 (1937).*

10. An actual controversy must exist at all stages of review, not merely when the complaint is filed. The Court "does not sit to decide arguments after events have put them to rest". *Doremus v. Board of Education*, 342 U.S. 429, 431 (1952); *See Lake Coal Company, Inc. v. Roberts & Schaefer Co.*, 54 U.S.L.W. 4026 (U.S. No. 84-1240, Dec. 2, 1985). There is no such controversy in existence here and therefore the Court should dismiss this cause as moot.

STUTZ, DYER, MILLER & DELAP

By .....

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81 F 1850

—o—

NOTICE OF DISMISAL

—o—

ANDREW K. BURT,

Plaintiff,

v.

THE BOARD OF REGENTS at the University of Nebraska, et al.,

Defendants.

Plaintiff, Andrew K. Burt, by and through his attorneys, Stutz, Dyer, Miller & Delap, gives notice of dismissal of the within action pursuant to F.R.C.P. 41(a)(1) and as grounds therefor shows unto the Court:

1. Plaintiff wishes to dismiss his action; and

2. No defendant has filed or served a responsive pleading.

Dated: February 18, 1986.

Respectfully submitted,
STUTZ, DYER, MILLER & DELAP

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Supreme Court, U.S.
FILED
FEB 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-298

(6)

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,
Petitioner,

v.

ANDREW K. BURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS

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February 24, 1986

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No. 85-298

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,
Petitioner,

v.

ANDREW K. BURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS

PRELIMINARY STATEMENT

Respondent, Dr. Burt, commenced the present litigation in October 1981 claiming defamation, breach of contract, interference with prospective advantage and outrageous conduct. Later, Dr. Burt amended his Complaint to add claims under 42 U.S.C.A. § 1983 that his civil rights, specifically his liberty and property interests, had been in-

fringed by the conduct of Dr. Connolly and the Board of Regents of the University of Nebraska.

The petitioner, Dr. Connolly, and his co-defendant below, the Board of Regents, filed motions to quash summonses and to dismiss. These motions were filed together with affidavits of Dr. Connolly and Richard R. Wood. Dr. Burt's responses to these motions included affidavits of Dr. Burt and Dr. Grant Steffen. The inclusion and consideration of these affidavits causes the motions to dismiss to be treated as motions for summary judgment under Fed. R. Civ. P. 56. (Fed. R. Civ. P. 12(b).; *see* Section IA, *infra.*) In the District Court in Colorado, Dr. Connolly and the Board of Regents prevailed after a brief hearing on the motions.

Dr. Burt, in his Suggestion of Mootness, now claims that his resources have been consumed, that he is unable to pursue this case further, and that therefore he will dismiss it voluntarily under Rule 41(a)(1). Thus, he claims, the case has become moot. This Suggestion of Mootness comes only after Dr. Connolly has been granted certiorari, after Dr. Connolly's brief on the merits has been filed, and after a brief for *amici curiae* on behalf of three concerned organizations has been prepared and filed.

Obviously, the request for a professional reference regarding Dr. Burt is not the only such request that Dr. Connolly has received and has responded to. Such requests are received and responded to by Dr. Connolly and his colleagues on the faculty of the University of Nebraska on a daily basis. Likewise, the membership of the three *amici* organizations receive and respond to such requests daily. Dr. Connolly and his colleagues are now faced with

a decision of the United States Court of Appeals for the Tenth Circuit, published in the Federal Reporter, Second Series, which holds, in effect, that they can be sued anywhere they send their response to these inquiries if their response does not contain a report which is favorable to the individual requesting the reference. Dr. Burt has apparently turned out to be the sort of litigant that is unwilling to be accountable for the processes he sets in motion by the commencement of his lawsuit. In view of the need to have a decision of whether the judgment of the Tenth Circuit represents the law of long-arm jurisdiction under the circumstances, there ought to be little sympathy for Dr. Burt's sudden unwillingness to take the final step of a thousand mile journey.

———o———

ARGUMENT

I. This Case Has Not Become Moot

Despite Dr. Burt's present inclination to withdraw from this controversy, for the following reasons the case is not moot.

A. Dr. Burt Is Not Entitled To Unilateral Dismissal of This Case

Dr. Burt's Suggestion of Mootness asserts that he has "an automatic right" to dismiss this action. Yet the purpose of Fed. R. Civ. P. 41(a)(1) is to allow a unilateral dismissal of the case only during the early stages of litigation and before the defendant has committed substantial resources to defense of the action and obtained rights or advantages with respect thereto. *D.C. Electronics, Inc. v.*

Nartron Corp., 511 F.2d 294, 296-97 (6th Cir. 1975); *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971); *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953); *see also, Hudson Engineering Co. v. Bingham Pump Co.*, 298 F. Supp. 387 (S.D.N.Y. 1969). The attempt to unilaterally dismiss the case after it has proceeded through the Court of Appeals, after certiorari has been granted by the U.S. Supreme Court, and after the defendants and *amici curiae* have filed their principal briefs in this Court hardly comes at an early stage of litigation.

Further, Fed. R. Civ. P. 41(a)(1) provides that a plaintiff may dismiss an action without Court approval only "at any time before service by the adverse party of an answer *or of a motion for summary judgment . . . .*" (emphasis added). Rule 12(b) states that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall be treated as one for summary judgment* . . . .

Fed. R. Civ. P. 12(b) (emphasis added). Furthermore, Rule 12 also provides that a motion or responsive pleading may join any of the defenses enumerated in Rule 12(b). *Id.;* Fed. R .Civ. P. 12(g).

On December 11, 1981, Dr. Connolly and the Board of Regents filed their "Motion to Quash Service of Process and to Dismiss this Action For Lack of Subject Matter and *In Personam* Jurisdiction, Improper Venue, Insufficiency of Process and Service of Process and for Failure

to State a Claim Upon Which Relief Can Be Granted" (J.A. 10). Such motion included defenses under Rule 12(b)(1), (2), (3), (4), (5), and (6). In support of such motion, Dr. Connolly and the Board of Regents filed a brief (J.A. 15) and the affidavits of Dr. Connolly (J.A. 34) and Richard R. Wood (J.A. 38). Exhibits were also attached to Dr. Connolly's affidavit (J.A. 36 and 37). As well as supporting other defenses, these matters outside the pleadings were in support of Dr. Connolly and the Board of Regents' motion under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. (See especially affidavit of Richard R. Wood, J.A. 38 at ¶¶ 17-24.) Thus under Fed. R. Civ. P. 12(b) and for purposes of Fed. R. Civ. P. 41(a) (1), Dr. Connolly and the Board of Regents' motion of December 11, 1981 must be treated as a motion for summary judgment. *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 661-62 (5th Cir. 1979); *Tele-Views News Co. v. S.R.B. TV Pub. Co.*, 28 F.R.D. 303, 307 (E.D.Pa. 1961). Dr. Burt thus has no "automatic right" to dismiss his action under Rule 41(a)(1). This case does not become moot simply by Dr. Burt's announcement that he has filed a Notice of Dismissal pursuant to Rule 41(a)(1) in the District Court, which, under the circumstances, has no jurisdiction to act on the notice.

B. Dismissal Under Rule 41(a) (1) Is Without Prejudice And Would Leave Dr. Burt Free To Refile His Lawsuit, Frustrating Dr. Connolly's Attempts To Obtain This Court's Decision On The Merits

This is Dr. Burt's first attempt to dismiss this action voluntarily. Such dismissal would be without prejudice to his right to refile the lawsuit at some later date. Fed. R. Civ. P. 41(a)(1). Several of Dr. Burt's claims for relief,

including claims for breach of contract, interference with prospective advantage, outrageous conduct, and his claims for violation of his civil rights, are governed by a six year statute of limitations that has not yet expired. E.g., C.R.S. § 13-80-110 (1973). Dr. Burt would be free to refile his suit on these claims, thereby frustrating Dr. Connolly's attempt to obtain this Court's decision regarding his amenability to suit in Colorado.

In addition, since statutes of limitations are matters of affirmative defense, they are not an impediment to filing suit. Theoretically, Dr. Burt would be free to refile any of his claims at any time, leaving Dr. Connolly at his peril to assert the statute of limitations as an affirmative defense if such suit is refiled.

For these reasons, the mere desire of Dr. Burt to unilaterally dismiss this case does not render the question before this Court moot. This action should proceed to its conclusion. Dr. Burt's attempt to dismiss his action at this stage should be denied and the question of whether Dr. Connolly is subject to suit in Colorado should be finally determined.

C. The Issues Addressed In This Case Are Capable Of Repetition And Almost Inevitably Will Be Repeated

As chairman of his department at the University of Nebraska Medical School, Dr. Connolly frequently receives inquiries of the sort to which he responded in this case. These inquiries are often from outside the State of Nebraska, but the need to respond to out-of-state inquiries is no less compelling. *See* Brief of *Amici Curiae* at pp. 10-13. The situation faced by Dr. Connolly in this case is not only capable of repetition but almost inevitably will be repeated.

The situation presented by this lawsuit is not faced only by Dr. Connolly. As evidenced by the appearance of three national educational organizations as *amici curiae*, the issues presented in this case are faced daily by persons in Dr. Connolly's position across the nation. Meanwhile, the public interest in the free flow of information concerning applicants for positions on hospital staffs, university faculty, admission to the bars of the various states, and other technical and professional positions, is being harmed by the judgment below. Without this Court's decision, the "underlying question persists and is agitated by the continuing activities and program of petitioners." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 179 (1968).

II. If This Court Finds Nevertheless That This Case Has Become Moot, It Should Yet Reverse The Decision Of The Court Of Appeals

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), Justice Douglas declared that when a case has become moot while on appeal it is the practice of this Court to "reverse or vacate the judgment below" because of the appellant's or petitioner's loss of the right of review. *Id.*, at 39. This practice is to prevent judgments which have become unreviewable from "spawning any legal consequences." *Id.* at 41. It has been said that it is the *duty* of appellate courts to reverse or vacate a lower court decision when the case has become moot while on appeal. *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936).

While most cases decided since *Munsingwear* have merely vacated rather than reversed the judgment below

(*see, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 n. 9 (1982)), most of the cases relied on by Justice Douglas in *Munsingwear* involved *reversal* rather than mere vacatur. See cases cited in *Munsingwear*, 340 U.S. at 39 n. 2.

The decision of the Tenth Circuit has already been published at 757 F.2d 242. To vacate that decision will prevent it from having *res judicata* effect to be sure. *See Munsingwear*, 340 U.S. 36. But as a practical matter, the decision will "spawn legal consequences," at least within the Tenth Circuit, if it is not reversed. Lower courts, especially within the Tenth Circuit, are very likely to take the vacated decision as reported to indicate how the Court of Appeals will rule under similar circumstances in the future and to enter orders consistent with that decision.

In *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466 (1916), the Court was faced with the question of "what our order should be with reference to the decree below rendered" after the case had become moot. Stating that the court's order "must be based solely upon determining what will be 'most consonant to justice' in view of the conditions and circumstances of the particular case," (*id.* at 478) the court concluded:

> [I]n view of the nature and character of the conditions which have caused the case to become moot, we are of opinion that the ends of justice exact that the judgment below should not be permitted to stand when, without any fault of the government, there is no power to review it upon the merits, but that it should be reversed. . . .

Id. Under the circumstances, if this case is found to have become moot, the decision of the Court of Appeals should not merely be vacated but should also be reversed.

III. If This Case Is Found To Have Become Moot, This Court Should Award Double Costs And Attorneys' Fees

Dr. Burt claims to have exhausted all resources for persuing this action and that this fact forms the basis for his decision to dismiss this action and render the case moot.

As of the time the Tenth Circuit rendered its judgment, Dr. Burt still faced the expense of discovery and of conducting a trial on the merits of his claims. Presumably, he knew then of the state of his resources, yet he made no move to dismiss the action. Dr. Burt knew of Dr. Connolly's intention to petition this Court for certiorari because his counsel had been served with Dr. Connolly's motion to the Tenth Circuit to extend the stay of mandate for the purpose of preparing a petition. Yet, Dr. Burt made no attempt then to dismiss this action.

Instead, Dr. Burt waited and allowed the petition for certiorari to be prepared and filed. When this Court, through its clerk, strongly suggested that Dr. Burt respond, Dr. Burt filed his reply brief and did not let on that the case may then have been moot.

After certiorari was granted, Dr. Burt made no suggestion of mootness. Instead, his counsel entered discussions with counsel for Dr. Connolly on the content of the Joint Appendix, and the parties came to an agreement on such content. At the same time, Dr. Connolly's counsel was preparing his principal brief, which was due January

16. On January 6, a few days before Dr. Connolly's brief was due at the printer, Dr. Burt made an offer of settlement but did not inform Dr. Connolly that he intended to dismiss the action.

Dr. Connolly's principal brief was filed, as was a brief for *amici curiae* after Dr. Burt gave his consent to the filing of the *amicus* brief, with no suggestion of mootness.

Only now, when the onus is on Dr. Burt to file a principal brief in this action has the suggestion of mootness, the announcement of Dr. Burt's lack of funds to pursue this matter, been made.

Apparently, Dr. Burt has allowed Dr. Connolly needlessly to have the petition for certiorari and his principal brief prepared and filed on his behalf. Under the circumstances an award of double costs under Supreme Court Rule 50.7 would be appropriate. In addition, or alternatively, this Court should award attorneys' fees to Dr. Connolly pursuant to 28 U.S.C.A. § 1927.

———o———

CONCLUSION

For the foregoing reasons, petitioner requests this Court to find that the action has not become moot and proceed to set this matter for oral argument. Alternatively, and if this Court finds that this case has become moot, petitioner requests that this Court enter its order reversing the decision of the Court of Appeals for the Tenth Circuit or, alternatively, vacating the decision below. Petitioner also requests that this Court award petitioner

double costs and attorneys' fees, and grant such additional and further relief as this Court deems appropriate under the circumstances.

DATED THIS 24TH DAY OF FEBRUARY, 1986.

Respectfully submitted,

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FILED
MAR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-298

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

vs.

ANDREW K. BURT,

Respondent.

RESPONSE TO PETITIONER'S BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS

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March 5, 1986

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PRELIMINARY STATEMENT

Respondent, Dr. Andrew K. Burt, (hereinafter referred to as "Respondent") commenced the present litigation in October, 1981, when he was denied privileges in at least one Colorado hospital based on a letter written on October 21, 1980 by Dr. John F. Connolly, Chairman of the

Department of Orthopaedics at the University of Nebraska College of Medicine.

The Petitioner, Dr. Connolly, (hereinafter referred to as "Petitioner") never filed a responsive pleading after he was served with Dr. Burt's complaint. Although he did file motions to quash summonses and to dismiss, such motions were never treated as responsive pleadings. Justice John P. Moore, the presiding Judge in the above mentioned action, dismissed the case based on Dr. Connolly's Motion to Dismiss for lack of inpersonam jurisdiction pur suant to Fed. R. Civ. P. 12(b)(2). (J.A. 101; see Section IA *infra.*). This case was thereafter appealed and reversed in the Tenth Circuit and a Petition for Certiorari was granted by the Supreme Court of the United States.

In an attempt to be rational and conscienciously, Respondent looked carefully at the steps and resources needed to end this "thousand mile journey." Respondent discovered that even if he prevails in this Court, the case will be remanded to the District Court for trial. If he is successful at the District Court level, Petitioner will have the right to appeal such judgment. Respondent recognizes that he is far from the "last step of a thousand mile journey", but in actuality is still on the first leg. Even if Respondent is successful, he is looking at many more years of litigation and expenses. Rather than subjecting both himself and Petitioner to this, Respondent is willing to dismiss *with prejudice* any claim that he may have. Petitioner, with no apparent motive but vindictiveness, seeks to continue expending both his own and Respondent's resources.

ARGUMENT

I. THIS CASE HAS BECOME MOOT

This case is moot pursuant to the Federal Rules of Civil Procedure and the United States Constitution for the following reasons:

A. Burt Is Entitled To Unilateral Dismissal Of This Case Pursuant To Fed. R. Civ. P. 41(a)(1)

Petitioner first asserts that Respondent may not dismiss the action under Fed. R. Civ. P. 41(a)(1) because he filed a Motion to Dismiss for failure to state a claim, which pursuant to Rule 12(b), may be treated as a Motion for Summary Judgment. However, Rule 41(a)(1) requires the actual "service" of a Motion for Summary Judgment, not merely the Court's consideration of such a motion. Secondly, it appears that Petitioner's Motion for Failure to State a Claim was never even considered by the District Court. Obviously, Petitioner did not believe that it was important enough to the issues of this case to include a copy of it in this Court's record. *See, Joint Appendix.* A review of Respondent's Rebuttal Brief to Defendant's Oral Argument (J.A. pp. 94-100) and Judge Moore's Memorandum Opinion & Order (J.A. 101-104) shows that the issue of failure to state a claim was never considered. Since the Motion was not considered, it cannot therefore be treated as a Motion for Summary Judgment.

The purpose of the limitation in Rule 41(a)(1) is that when an Answer or Motion for Summary Judgment is

filed, it puts the factual questions at issue and gives defendant a right to have them decided. In this case, no factual questions are yet at issue.

B. In The Memorandum In Support Of Notice Of Dismissal Filed With The District Court For The District Of Colorado, Respondents Have Agreed To Dismiss With Prejudice Therefore Precluding Any Further Attempts To Refile Lawsuit.

Respondent has already stated in his Memorandum in Support of Notice of Dismissal, and reiterates in this brief, that he requests the District Court to dismiss the case at hand, *with prejudice*. (See attachment). This further strengthens Respondent's position that this case should be dismissed as moot since dismissing a case with prejudice is proof that he is not interested in, nor will be able to, pursue it further. Such dismissal will in no way prejudice the adversary party, but will save him considerable costs and attorney's fees.

C. The Issues In This Case Are Factual And Personal To Respondent, Therefore Respondents' Dismissal Renders Them Moot.

Respondent asserts that the issues in this case are unique. The assertions in the Complaint and Amended Complaint are that Petitioner made false statements with malicious intent. Certainly, Petitioner is not asserting that such action "almost inevitably will be repeated." The situation presented by this lawsuit therefore is one of personal vendetta and is not an issue that is likely to recur. In fact, professional ethics and alumni pride are two major

factors in preventing this behavior from becoming a recurring event.

While the issue of long arm jurisdiction may remain, the issue should be decided in the context of a case or controversy. It seems clear that pursuant to Art. III. § 2, of the United States Constitution, the jurisdiction of all federal courts is limited to "cases and controversies." *Aetna Life Ins. v. Haworth*, 300 U.S. 277 (1937). Since dismissal of the original action by Petitioner eliminates any real or substantial dispute affecting the legal rights and obligations of parties having adverse interest, the U.S. Supreme Court does not have jurisdiction to hear this action and it should be dismissed as moot.

Furthermore, an actual controversy must exist at all stages of review, not merely when the complaint is filed. Since there is no such controversy in existence here and since the issues in this care are not likely to recur, the Court should dismiss this cause as moot. *Doremus v. Board of Education*, 342 U.S. 429, 431 (1952); *See, Lake Coal Company, Inc. v. Roberts & Schaefer Co.*, 54 U.S.L.W. 4026 (U.S. No. 84-1240, Dec. 2, 1985).

II. RESPONDENT HAS NO OBJECTION TO THIS COURT VACATING THE TENTH CIRCUIT'S DECISION.

Respondent no longer has any interest in bringing this suit in Colorado nor does he have any intent to pursue it further on its merits. Therefore, if this Court feels it is best to vacate the Tenth Circuits' decision, Respondent has no objection.

III. THIS CASE SHOULD BE FOUND TO HAVE BECOME MOOT AND EACH SIDE SHOULD PAY THEIR OWN ATTORNEYS' FEES.

As noted in Petitioner's Response, Respondent attempted various negotiations with Petitioner at different stages of this lawsuit but none that were found to be satisfactory to all parties involved. The fact that Respondent was hoping to settle this case before it got this far is neither an unusual nor an unethical tactic. Therefore, Respondent should not now be prejudiced because he no longer has the finances nor the resources to continue this lawsuit.

Furthermore, Petitioners request that this Court award double costs or attorneys' fees to Petitioner is ludicrous. Such a request is based on the "unreasonable and vexatious" multiplication of the proceedings. However, Respondent, by dismissing this case is moot, will have managed to save both parties additional attorneys fees and court costs. It is only reasonable, under the circumstances, that both sides pay their own attorneys' fees and costs.

———o———

CONCLUSION

For the foregoing reasons, Respondent requests this Court to find that the action has become moot and dismiss this case in full. Furthermore, Respondent requests that

this Court rule that both sides shall bear its own attorneys' fees and costs.

Dated: March 5, 1986.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81 F 1850

—o—

MEMORANDUM IN SUPPORT OF NOTICE
OF DISMISSAL

—o—

ANDREW K. BURT,

Plaintiff,

v.

THE BOARD OF REGENTS at the university of Nebraska, et al.,

Defendant.

Plaintiff, Andrew K. Burt, by and through its attorneys, Stutz, Dyer, Miller & Delap, respectfully moves this Court, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, to dismiss the above styled action, with prejudice, and as grounds therefore shows unto the Court:

1. That the Defendants were served with a true and correct copy of the Summons & Complaint herein in the United States District Court, District of Colorado, on October 20, 1981.

2. That Defendants never filed or served a responsive pleading, and, under F.R.C.P. (41(a)(1), Plaintiff has an automatic right of dismissal until, and unless, such responsive pleading is filed or served by defendant.

3. That Defendants never counterclaimed or brought an independent action against Plaintiff, and therefore dismissal of the original action by Plaintiff renders the action moot.

4. That Defendants filed a Motion to Dismiss for lack of jurisdiction on December 14, 1981. The U.S. District Court granted the Motion on October 1, 1982.

5. That a Motion to Dismiss is not a responsive pleading preventing a voluntary dismissal under F.R.C.P. 41(a)(1).

6. That Plaintiff appealed the case on November 12, 1982, alleging that there were sufficient minimum contacts between Defendants and Colorado to warrant personal jurisdiction in Colorado. The United States Court of Appeals for the Tenth Circuit concluded that the District Court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment was therefore reversed and remanded for further proceedings.

7. That Defendants thereafter filed a Petition For Certiorari in the United States Supreme Court on August 22, 1985. The said Petition for Certiorari was granted on December 2, 1985, Case No. 85-298.

8. That Plaintiff has exhausted all funds and resources in pursuit of this action and has therefore decided to forego any future action and dismiss the suit in its entirety.

9. That an action rendered moot, under existing precedent, will be cause for the United States Supreme Court to remand the case to the United States District Court for the District of Colorado with instructions to dismiss the cause as moot. See *Lake Coal Company, Inc. v. Roberts*

& Schaefer Co., 54 U.S.L.W. 4026 (U.S. Dec. 3, 1985), vacating as moot (6th Cir. 1985).

Dated: February 18, 1986.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN COUNCIL ON EDUCATION, AND THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AS AMICI CURIAE

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN COUNCIL ON EDUCATION, AND THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AS AMICI CURIAE

This brief is filed in support of petitioner Professor Connolly on behalf of the American Association of University Professors, the American Council on Education, and the Association of American Medical Colleges. Letters of consent from both parties have been filed with the clerk.

INTEREST OF AMICI CURIAE

All three amici are membership organizations which seek to advance the interests of higher education, promote and protect scholarly research, and facilitate cooperation among faculty members, institutions of higher

learning, and the community. The organizations have a national perspective on issues of academic freedom, student rights, and the norms of the academy, and are thus well situated to address the grave problems created by the decision of the court of appeals in this case.

The American Association of University Professors ("AAUP") is a national association of over 50,000 faculty members and research scholars in all academic disciplines. Founded in 1915, AAUP has as one of its central tasks the development of policy statements intended to establish minimum standards of institutional practice in higher education. Policies endorsed by AAUP include the seminal 1940 *Statement of Principles on Academic Freedom and Tenure*, the 1966 *Statement on Professional Ethics*, and the 1981 *Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*.[1] The latter bears on letters of reference written by faculty members about colleagues in the same or other institutions in connection with decisions about initial appointment, reappointment, and granting of indefinite tenure. AAUP is uniquely situated to speak to the professional responsibilities of faculty members.

The American Council on Education ("ACE") was founded in 1918 and includes in its membership over 1400 colleges and universities and 145 higher education organizations across the United States. ACE attempts to promote and preserve the interests of all who compose the academic community—students, faculty, and administrators. Among its activities, ACE promulgates policies on issues such as the confidentiality of faculty personnel files. It shares with the other amici a vital concern about the effectiveness of evaluation processes.

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[1] All but the last of these may be found in AAUP POLICY DOCUMENTS AND REPORTS (1984), a copy of which is in the collection of the Supreme Court library. The *Preliminary Statement on Judicially Compelled Disclosure* appears at 67 ACADEME 27 (February-March 1981).

The Association of American Medical Colleges ("AAMC") is composed of all 127 accredited and operating medical schools in the United States, 436 teaching hospitals, and 76 academic and professional societies. The aggregate membership of these constituent components is over 100,000 physicians and scholars who are actively engaged in medical education, biomedical research, and the provision of patient care. AAMC's fundamental purposes are advancing medical education and the nation's health, and to these ends it is essential that scholars offering professional opinions about former students and fellow researchers freely offer their candid judgments.

All three amici, which appear from time to time in this Court in cases of central importance to the academic community,[2] respectfully submit that affirmance of the court of appeals decision would seriously undermine processes for professional and scholarly evaluation.

STATEMENT OF THE CASE

Professor John Connolly received an inquiry in 1980 concerning a former student, Dr. Andrew Burt, from a Denver hospital to which Burt had applied for staff privileges. Professor Connolly, chair of the University of Nebraska Medical Center's Department of Orthopedic Surgery, responded by letter confirming that Dr. Burt had served a three-year residency at the university. Connolly expressed his professional opinion that Burt's performance was "well below average" and that, while he might function satisfactorily in some other branch of medicine, Burt was not suited to the practice of orthopedic surgery.

The hospital denied staff privileges to Burt, who subsequently filed an action for defamation and related

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[2] *E.g., Regents of the Univ. of Mich. v. Ewing*, 54 U.S.L.W. 4055 (U.S. Dec. 12, 1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

claims against Connolly and the University of Nebraska in federal district court in Colorado. After the action was filed, Burt moved to California where he now resides. Connolly was, and remains, a Nebraska resident. He owns no property in Colorado and has transacted no business there. His sole contact with that state was the mailing of a private letter expressing his professional opinion in response to an inquiry about a former student. Answering the inquiry offered no prospect of personal or financial advantage for Connolly or his university, but was rather the rendering of a traditional academic service, an ordinary element in the regular process of professional references and evaluation.

The claims against the university were dismissed on grounds of sovereign immunity. The district court granted Connolly's motion to dismiss for lack of *in personam* jurisdiction. The court ruled that the action was technically within the reach of Colorado's long-arm statute. Colo. Rev. Stat. § 13-1-124(1)(b) (1973). The statute confers jurisdiction to the Colorado courts in actions involving "[t]he commission of a tortious act within this state," and the district court observed that the element of "publication" of the allegedly defamatory letter occurred in Colorado. The court concluded, however, that Connolly lacked sufficient minimum contacts with the state to satisfy due process. The court of appeals, Judge Seth dissenting, reversed on the basis of *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984) and *Calder v. Jones*, 104 S.Ct.1482 (1984). The court of appeals emphasized that Colorado has a significant interest in deterring the commission of torts within its borders. It found that due process notions of fairness were not violated when an alleged intentional tortfeasor is called to account in any jurisdiction where harm supposedly occurred. In dissent, Judge Seth pointed out that the letter was solicited by Burt and concerned events occurring in Nebraska rather than Colorado. He ob-

served that the district court must have found that Connolly could not reasonably have anticipated being sued in Colorado. Review in this Court is directed to the constitutionality of the Colorado long-arm statute under the Fifth and Fourteenth Amendments as applied to Professor Connolly, whose sole contact with Colorado was in mailing the letter to a Colorado address.

SUMMARY OF ARGUMENT

Professor Connolly in his petition for certiorari aptly described the effect of the court of appeals decision as the designation of each of a faculty member's former students as his agent for service of process. *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Faculty members provide letters of reference about students and fellow scholars as part of their professional obligations to their disciplines; given the mobility of these populations such letters commonly cross state lines. Amici argue that a solicited letter of reference does not alone satisfy the Due Process "minimum contacts" test. Such letters are written outside of a commercial context and result in no direct benefit to the sender. The sender merely acquiesces in a request of the student or fellow researcher to provide an evaluation, and does not affirmatively seek the benefits of the distant forum. The effect of the judgment below would be to diminish faculty members' willingness to provide evaluations, interfering with a source of information important to employers, such as the Colorado hospital in this case, and institutions of higher education. Amici urges this Court to reverse the judgment of the court of appeals.

ARGUMENT

I. DISCHARGE OF FACULTY MEMBER'S DUTY TO RESPOND TO AN INQUIRY ABOUT A STUDENT OR FELLOW SCHOLAR SHOULD NOT ALONE SERVE AS THE BASIS FOR PERSONAL JURISDICTION.

Among the professional duties of a faculty member such as Professor Connolly is the evaluation of current and former students and fellow scholars. This obligation arises as part of the faculty member's responsibilities to his or her discipline and to society. We address in this section the nature and sources of the obligation and the important interests advanced by such evaluations. We argue that discharge of this professional duty alone should not subject a faculty member to suit in any locale where the evaluation might be transmitted. The section concludes with some observations about the national character of higher education in America and a brief examination of the unfair burdens imposed on an individual professor by litigation in a distant forum.

The academic profession is unique in that its domain includes all fields of learning and its objectives are the acquisition and transmission of knowledge. This Court has on many occasions addressed the importance to society of the "speculation, experiment and creation" fostered by high education and its role as the "marketplace of ideas." [3] As Justice Frankfurter observed in *Wieman v. Updegraaf*,

> the functions of educational institutions in our national life and the conditions under which they alone can adequately perform them are at the basis of . . . limitations upon State and National power.

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[3] *E.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

344 U.S. 183, 197 (1952) (Frankfurter, J., concurring). Amici urge that due process compels such a limitation on the reach of the Colorado long-arm statute by virtue of the essential function of letters of appraisal, which we address in Part I, and the absence of minimum contacts between Professor Connolly and Colorado, addressed in Part II.

A. A Faculty Member Has a Professional Obligation to Evaluate Students and Fellow Researchers.

Institutions of higher learning function for the purposes of advancing the frontiers of knowledge through research and study and disseminating cumulative knowledge through teaching. The direct participants in these endeavors are faculty members, who are masters of complex bodies of knowledge, and students, who are the next generation of scholars and citizens. The close interactions of academic life afford faculty members a special opportunity to assess the strengths and weaknesses of students and fellow researchers. The academy is traditionally and necessarily responsible for the evaluation of those who study and conduct research there, and the primary source of these assessments is the professional judgments of the members of its faculty.[4] *Regents of the University of Michigan v. Ewing*, 54 U.S.L.W. 4055, 4058 (U.S. Dec. 12, 1985). Professional evaluation occurs not only within an institution but also, as in this case, beyond its walls.

A faculty member's obligation to assess the work of students and fellow researchers is part of the responsibility to his or her discipline. The noted sociologist Edward Shils has observed:

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[4] The 1966 *Joint Statement on Government of Colleges and Universities* specifies that faculty members have primary responsibility for the academic evaluation of students and for matters relating to faculty appointment, promotion, and tenure. AAUP POLICY DOCUMENTS AND REPORTS 105, 109 (1984). The *Joint Statement on Government* was formulated by AAUP, ACE, and the Association of Governing Boards of Universities and Colleges.

> One of the obligations of every teacher and of everyone who does scientific or scholarly research is to scrutinise the tradition of his subject, to winnow out the valid and important from the invalid and unimportant. This must be done both in teaching and research. The critical scrutiny of the tradition and particularly of the most recent increments to it is an obligation of an university teacher to his colleagues in his own university and at others, present and future, even where it requires that he render negative judgments on their work.

THE ACADEMIC ETHIC 59 (1983).[5] A faculty member is thus under a professional obligation to respond to inquiries about former students and fellow researchers with an honest assessment, whether positive or negative.[6]

In the instant case Professor Connolly's duty to respond, which Dr. Burt has conceded, arose from not only his obligations as a faculty member but also his responsibilities as a physician. Connolly's letter was an integral part of a process for assuring that patients requiring orthopedic surgery in Colorado receive care that is adequate. His obligation to his discipline is thus coupled with a duty to protect public health.

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[5] *See* J. Brubacher, ON THE PHILOSOPHY OF HIGHER EDUCATION 102-03 (1977) (ethical obligation of scholar to discipline).

[6] Another expression of this obligation, and the absence of financial return for its discharge, is found in a policy statement of the American Council on Education concerning the confidentiality of faculty evaluations:

> Institutions have long based the appointment and advancement of faculty members on academic qualifications described rigorously in evaluations of an individual candidate's work by academic peers inside and/or outside the institution. At many institutions these evaluations, provided without fee as a professional duty, are submitted in confidence.

Confidentiality of College and University Faculty Personnel Files: Its Appropriate Role in Institutional Affairs, Self-Regulation Initiatives: Guidelines for Colleges and Universities, American Council on Education (Dec. 1981).

Letters of appraisal from faculty members help assure that prospective employers have full information about students they contemplate hiring and that colleges and universities are well informed in making decisions concerning faculty appointments. Where a letter expresses a negative judgment, as in this case, the information nonetheless retains a great measure of social utility. (We note that judges are among the beneficiaries of faculty evaluations, as they frequently contact law professors for references concerning prospective clerks.) The inevitable consequence of affirmance of the court of appeals decision would be to diminish faculty members' willingness to discharge this obligation, at least with respect to evaluations destined to cross state lines.[7] This would have a deleterious impact on the placement of students completing professional, graduate, and undergraduate education and also on the evaluation of faculty members. The reluctance of "outside evaluators," whose views are commonly solicited on matters of faculty appointment, reappointment, and tenure, would erode the peer review system, which the Seventh Circuit has called "the very lifeblood and heartbeat of academic excellence." [8] The court, speaking in the

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[7] Some university placement offices keep general letters of reference about students from faculty members on file. The placement office may send out copies of such a letter directly to prospective employers, without notice to the author of the letter. The faculty member thus would not even know when a recommendation letter was transmitted out of state.

[8] *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983). The importance of the peer review system has been stressed in cases holding that the need for confidentiality in faculty evaluations may outweigh the importance of discovery in a civil rights action. *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901 (2d Cir. 1982); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977); *Zaustinsky v. University of Cal.*, 96 F.R.D. 622 (N.D. Cal. 1983); and *McKillop v. Regents of Univ. of Cal.*, 386 F.Supp. 1270 (N.D. Cal. 1975). The major rulings to the contrary are *EEOC v. Franklin and Marshall College*, No. 84-1739 (3d Cir. filed October 21, 1985) and *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981).

context of a dispute over the subpoena of confidential evaluation materials, went on to indicate that

> The tenure review process requires that written and oral evaluations submitted by academicians be completely candid, critical, objective and thorough in order that the University might grant tenure only to the most qualified candidates based on merit and ability to work effectively with colleagues, students, and the administration.

715 F.2d at 336. Just as unfettered discovery would seriously compromise this process, so too would the specter of litigation in distant forums.

We note finally that the substantive law of defamation itself reflects the societal importance of letters of reference. A letter of appraisal to a prospective employer is a classic type of communication which, even though defamatory, is privileged when it is made in the interest of both the sender and the recipient. RESTATEMENT (SECOND) OF TORTS § 596 (1977).[9] The likelihood that Professor Connolly will prevail on the merits in this action, however, does not mitigate the inappropriateness of Colorado as the forum for the contest. The substantive privilege rather further illustrates the value to society of letters of reference.

B. Exposure to the Risk of Litigation Anywhere in the Country Imposes an Unreasonable Burden on a Faculty Member.

We turn next to a brief demonstration that, given the scope of student migration, faculty members would be

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[9] As one commentator has observed, "[t]he privilege is most frequently invoked in cases involving reports by present or former employers to prospective employees." R. Sack, LIBEL, SLANDER, AND RELATED PROBLEMS 305 (1980). The privilege has been applied to communications to faculty tenure committees. *See Colson v. Steig*, 89 Ill.2d 205, 433 N.E.2d 246 (1982) (scope of qualified privilege for defamatory communications to tenure committee measured by test of "actual malice"); *Petroni v. Board of Regents*, 115 Ariz. 562, 566 P.2d 1038 (Ariz. Ct. App. 1977) (absolute privilege applied).

exposed to the possibility of litigation anywhere in the country under the analysis of the court of appeals. This part concludes with some observations about the burdens on a faculty member arising from litigation in a distant forum.

Higher education in the United States was essentially a local phenomenon until after the Civil War.[10] The typical pre-Civil War college, urban or rural, drew its student body from the immediately surrounding environs and was quite unknown fifty miles from its campus. Only a few institutions were sufficiently famous to attract students willing to overcome the obstacles of geography. After the Civil War both business and the professions assumed a national character and many local colleges added graduate schools for advanced training. The graduate schools brought the institutions a wider reputation, and eventually a national market developed for both students and professors. This mobility today is reflected in statistics on student migration to college.

The National Center for Education Statistics, an arm of the Department of Education, reported that in the fall of 1981, 548,091 new out-of-state students enrolled for the first time in undergraduate, graduate, and professional schools.[11] In 1975, the percentage of out-of-state undergraduates was 30% or more in ten states.[12] One would expect the figures to be even higher for graduate and professional education, by virtue of the smaller number of institutions offering advanced training.[13] Such figures

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[10] This description is drawn from C. Jencks and D. Riesman, THE ACADEMIC REVOLUTION 155-198 (1969). *See* W. Metzger, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY (1955).

[11] Nat'l Center for Education Statistics, DIGEST OF EDUCATION STATISTICS—1983-84 90 (1983).

[12] ACE, 1984-85 FACT BOOK ON HIGHER EDUCATION 140 (1984).

[13] The nationwide character of medical training is also illustrated by the national placement program for medical residencies, known

support the common sense observation that the former students of a faculty member such as Professor Connolly are dispersed throughout the country. Fellow scholars are also widely scattered.

The enormous inconvenience to the individual faculty member sued in a distant locale because of a letter of reference cannot be overstated. The faculty member, unfamiliar with the forum, would lack information about attorneys in the area and would be personally burdened with making inquiries. In contrast, a commercial concern such as a magazine publisher has staff and resources to employ in locating the most suitable attorney. The professor's financial resources to retain an attorney would probably be modest, as the average faculty salary in the country in 1983-84 was $29,130.[14] As an extreme example, a faculty member at a small rural institution located in an area with a relatively low cost living might be sued in a major metropolitan area with a high cost of living and similarly high attorneys fees. The inconvenience and expense to the individual of retaining a lawyer in an unknown and distant locale are formidable.

After retaining an attorney, the professor would then face logistical difficulties in consulting with the attorney and attending the trial. These obstacles would further increase the costs and would also magnify the intrusion on the professor's scholarly work.[15] While litigation inevitably poses a burden on its participants, the burdens on an individual faculty member vulnerable to suit any-

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as the National Resident Matching Program. See J. Graettinger, *Balance in Medical Education Networks*, 55 J. of Medical Educ. 159 (March 1980) (comparing "import" and "export" of medical graduates to residencies, by state).

[14] *Annual Report on the Economic Status of the Profession 1984-85*, 71 ACADEME 7 (March-April 1985).

[15] *See* Comment, *Forced Disclosure of Academic Research*, 37 VAND. L. REV. 585 (1984).

where in the country because of a professional reference solicited, without compensation, on behalf of an individual are plainly excessive.

II. DUE PROCESS "MINIMUM CONTACTS" TEST FOR PERSONAL JURISDICTION IS NOT MET BY MERELY SENDING SOLICITED LETTER OF RECOMMENDATION INTO THE FORUM.

The Due Process Clause of the Fourteenth Amendment limits the ability of states to assert jurisdiction over nonresident defendants. The clause requires that jurisdiction be predicated upon the defendant's "minimum contacts" with a state, *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and imposes a standard of "fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), *quoted in World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). A primary concern is the burden on the defendant if he were required to defend in the state. Imposition of this burden is constitutional only where the defendant "purposefully avails itself of the privilege of conducting activities within the forum. . . ." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

There is no mechanical test for whether minimum contacts exist; rather, the facts must be weighed on a case by case basis. *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978). "Few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Id.* at 92, *Estin v. Estin*, 334 U.S. 451, 545 (1948). In particular, it is not automatically sufficient that the defendant engaged in conduct having effects in the forum. In *World-Wide Volkswagen, supra*, the defendants had sold a car to the plaintiff which caused physical injury to the plaintiff in the forum; jurisdiction was nonetheless denied.

Similarly, in *Kulko v. Superior Court, supra*, the defendant had allowed his daughter to move to California to

be with his ex-wife. In the ensuing child support litigation, the lower court predicated jurisdiction upon the fact that in so doing the defendant had "caused an effect" within the state. 19 Cal. 3d 514, 521, 564 P.2d 353, 356 (1977). It held that the exercise of jurisdiction was reasonable because the defendant had purposefully availed himself of the benefits of forum law. This Court reversed. While agreeing that any effects test must be qualified by a requirement of "reasonableness," 436 U..S at 96, the opinion denied that the exercise of jurisdiction was reasonable because the defendant had not purposefully derived a benefit from activities relating to the state of California.

This Court's reasonableness requirement is not satisfied on the facts of the case at hand, because as in *Kulko* the defendant has not purposefully availed himself of the benefits and protection of the forum law. As in *Kulko*, the defendant's noncommercial activities, undertaken solely at the request of the party proposing jurisdiction, cannot meet the minimum contacts threshold. There are three respects in which Dr. Connolly's letter, like the father's action in *Kulko*, has not met the minimum contacts test. The recommendation letter was noncommercial; it was written solely at the behest of the plaintiff; and the imposition of jurisdiction would discourage compliance with such requests by other recommenders in the future.

A. Jurisdiction May Not Be Predicated on the Defendant's Noncommercial Activities.

In assessing jurisdiction, an "essential criterion in all cases is . . . the quality and nature of the defendant's activity." *Kulko*, 436 U.S. at 92, *citing International Shoe v. Washington*, 326 U.S. at 316-17. The *Kulko* opinion recognized two situations in which the forum effects of the defendant's activities might supply a reasonable basis for jurisdiction. These two situations arose where the effect of the defendant's conduct was physical injury in the state; and where the defendant sought or derived com-

mercial benefit from solicitation of business with a forum resident. *Kulko*, 436 U.S. at 96. As in *Kulko*, there can be no claim in the case at hand of physical injury to property or persons within the forum.

The alternative criterion of reasonableness—the commercial nature of the defendant's activities—is likewise obviously not satisfied in the present case. This criterion stems from the policies underlying the expansion of jurisdiction that occurred in the middle of this century.

> The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the states more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdiction.

Helicopteros Nacionales de Colombia v. Hall, 104 S.Ct. 1868, 1876 (1984) (Brennan, J., dissenting). *Accord*, *World-Wide Volkswagen*, *supra*, 444 U.S. 286, 293 (noting such historical developments and their acceleration).

There are several reasons for treating commercial enterprises differently from noncommercial activities. First, it is usually not burdensome for a party to defend himself in a state where he engages in economic activity. *World-Wide Volkswagen*, 444 U.S. at 298-99. For this reason, it may be appropriate to impose different standards upon businesses, which are better situated to defend lawsuits, than on individuals. *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977). Second, a commercial enterprise that purposefully avails itself of the privilege of conducting

activity in the forum is well situated to protect itself from the burdens of mounting a defense:

> [I]t has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connections with the State.

World-Wide Volkswagen, 444 U.S. at 297. These possibilities are not available to private parties, such as Dr. Connolly.

Third, subjection to jurisdiction is a reasonable quid pro quo for the extension of the benefits of conducting business locally. Defendants who conduct local business commonly rely upon local police powers to protect their own interests; and subjection to local powers is therefore not unfair. It is the existence of such a benefit that makes the exercise of jurisdiction based upon the forum effects of the defendant's conduct "reasonable." *Kulko*, 436 U.S. at 96-97. The existence of such a benefit is crucial to the assertion of jurisdiction, for even where the state has a strong interest in entertaining a dispute, jurisdiction is improper unless the defendant derives some benefit from his or her activities. *Kulko*, 436 U.S. at 100.

To suffice for jurisdictional purposes, this benefit may not be "attenuated," *World-Wide Volkswagen*, 444 U.S. at 299, or stem from some mere "collateral relation to the forum state." *Id.* Nor may it be a mere benefit to third parties. *Kulko*, 436 U.S. at 94 n.7. Thus, in *World-Wide Volkswagen*, jurisdiction was improper even though this Court conceded arguendo that the defendant received substantial revenues from automobiles used within the forum; this was inadequate benefit for personal jurisdictional purposes. 444 U.S. at 298. In *Kulko*, likewise, it was an insufficient "benefit" that the father's expenses were reduced when the children left to live with their mother in California. 436 U.S. at 95.

In contrast, in upholding jurisdiction over one commercial publisher in a defamation action brought in a state in which the defendant had sold magazines, this Court emphasized that the defendant had "continuously and deliberately exploited the New Hampshire market." Having entered the local market the defendant could be charged with knowing local laws "and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner." *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 1480, 1481 (1984).

The defendant in the present case has neither sought nor derived any commercial benefit from the state of Colorado; indeed, Professor Connolly has neither sought nor derived a benefit of any kind, "attenuated," "collateral," or otherwise. His situation is thus very different from that of the employees of the National Enquirer who were named as defendants in *Calder v. Jones*, 104 S.Ct. 1482 (1984). Those defendants, the editor and a reporter, were making their living writing the kind of journalism the National Enquirer purveys. Furthermore, Connolly did not derive any financial return from the activities in question that would pay for insurance. He has no "customers" upon whom to impose his costs. Nor is he positioned to call upon the forum's courts to enforce any claims of his own. Writing a letter of recommendation "is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." *Kulko*, 436 U.S. at 101. It is therefore an inadequate basis for jurisdiction.

B. Jurisdiction May Not Be Predicated on Mere Acquiescence In or Compliance With a Request of the Plaintiff.

In the usual commercial context, the defendant engages in a course of conduct with the expectation of procuring some benefit. In the present case, the defendant contem-

plates no such advantage. The explanation for the defendant's actions lies elsewhere; the defendant's conduct amounted to mere compliance with a request initiated by the plaintiff, who sought a professional opportunity. But mere acquiescence in or compliance with the plaintiff's request for a letter is not an adequate basis for jurisdiction.

This principle is illustrated by those precedents in which direct commercial benefit to the defendant was found wanting. In such situations, the lack of benefit to the defendant goes hand in hand with the existence of an alternative motivation for the complained-of activities, namely, a request by the plaintiff. Thus, in *Kulko v. Superior Court* the explanation for the father's decision to send the daughter to his ex-wife in California was the ex-wife and child's request, rather than any expectation of benefit. 436 U.S. at 87. Similarly, in *World-Wide Volkswagen*, the automobile in question found its way into Oklahoma merely because the plaintiff drove the car to that state. The defendant automobile dealer derived no benefit from the car's removal to Oklohoma; it merely acquiesced in the new owner's decision to drive the car there. 444 U.S. at 297 (emphasizing that defendant made no effort to serve forum markets). What these two cases have in common with the present litigation is that the contact with the forum is undertaken solely for the benefit of the plaintiff, and at the plaintiff's instigation.

The principle that mere acquiescence in the plaintiff's pursuit of a benefit cannot give rise to jurisdiction is sometimes phrased in terms of the insufficiency of the plaintiff's "merely unilateral activity." Numerous cases have affirmed that the plaintiff's unilateral connection with the state cannot confer jurisdiction over a nonresident defendant.[16] While this Court has spoken in

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[16] *Helicopteros Nacionales de Colombia, supra*, 104 S. Ct. at 1873; *World-Wide Volkswagen, supra*, 444 U.S. at 298; *Kulko*, 436 U.S. at 93-94, citing *Hanson v. Denckla*, 357 U.S. at 253.

terms of "unilateral activity", this phrase has not been construed literally to encompass only those of the plaintiff's decisions of which the defendant was unaware, or in which the plaintiff was uncooperative. For instance, the principle has been held to invalidate jurisdiction predicated upon the defendant's acceptance of checks drawn upon a forum state bank. *Helicopteros, supra*, 104 S. Ct. at 1873. Although the defendant in *Helicopteros* was surely aware of the bank on which the checks were drawn, and made no effort to object, this Court deemed such unilateral activity an improper consideration in the jurisdictional calculus.

Similarly, in *Kulko* the father was aware of the daughter's destination, and cooperated by purchasing an airplane ticket for her. After reiterating that unilateral activity does not satisfy the minimum contracts test, this Court continued:

> We cannot accept the proposition that appellant's acquiescence in Ilsa's desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself of the benefits and protections" of California laws.

436 U.S. at 94. This principal that mere acquiescence in the plaintiff's unilateral preferences embodies several policies.

The first policy underlying the principle that mere compliance or acquiescence in the plaintiff's pursuit of a benefit is not sufficient basis for jurisdiction is that such conduct does not put the defendant on notice that he or she may be haled into court in the forum. Under both *World-Wide Volkswagen*, 444 U.S. at 297, and *Shaffer v. Heitner*, 433 U.S. at 216, assertion of jurisdiction turns on whether the defendant could reasonably have antici-

pated being subject to suit in the forum.[17] Mere acquiescence in a request by the plaintiff does not provide sufficient notice of this possibility, as this Court noted in *Kulko*:

> Appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being "haled before a [California] court".

436 U.S. at 97. Like the father in *Kulko*, Professor Connolly simply had no reason to believe that complying with a request for a letter of recommendation would subject him to suit in a grossly inconvenient forum.

A second rationale underlying the principle that mere acquiescence in the plaintiff's pursuit of a benefit does not suffice for jurisdiction is the simple concern for fundamental fairness. "Fair play and substantial justice" is, of course, the touchstone of due process analysis. *International Shoe v. Washington*, 326 U.S. at 316. In the present case, the defendant has remained in Nebraska, the state in which his relationship with the plaintiff is centered. It is the plaintiff who has moved to another state. In *Kulko*, "basic considerations of fairness" were said to point "decisively" in favor of litigation in the defendant's home state where "it is [the defendant] who has remained in the State of the marital domicile, whereas it is [the plaintiff] who has moved across the continent." 436 U.S. at 97. As in the present case, the parties' relationship was centered in another state, and had virtually no connection with the forum. There is no unfairness in

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[17] *See* concurring opinion by Justice Stevens in *Shaffer v. Heitner*, 433 U.S. at 217-19.

requiring the plaintiff to litigate this case in Nebraska, a state with which he has ample contact by virtue of his three-year medical residency. There is, however, fundamental unfairness in subjecting the defendant to jurisdiction in Colorado simply because he complied with a request made in pursuit of plaintiff's own self-interest.

This principle is somewhat analogous to the general rule that process may not be served over a defendant who has been lured into the forum by the plaintiff. In *Wyman v. Newhouse*, 93 F.2d 313 (2d Cir. 1937), the defendant had entered the forum at the plaintiff's request, solely in order to see the plaintiff one last time before she left for Europe indefinitely. Jurisdiction was denied, as it is in cases where plaintiffs seek to attach property which they have tricked the defendant into sending into the forum. F. James & G. Hazard, CIVIL PROCEDURE 102 (3d ed. 1985); RESTATEMENT (SECOND) OF CONFLICT OF LAWS sec. 82 (1969).

A third policy underlying the refusal to grant jurisdiction based upon the defendant's acquiescence in the plaintiff's request is that predicating jurisdiction upon such contacts will discourage cooperative activities by defendant. As a general matter, courts are reluctant to penalize compliance with plaintiff's requests where the effect of doing so would be to deter socially desirable conduct. We turn finally to this consideration.

C. Assertion of Jurisdiction Is Improper Where It Would Discourage Socially Desirable Conduct.

Defense of a lawsuit in an inconvenient forum is, as argued earlier, an enormous imposition. Where commercial activity is involved, the risk of expense of an occasional lawsuit may be warranted. Where, in contrast, jurisdiction is predicated upon conduct undertaken at the plaintiff's request and not for the defendant's benefit, the consequences of imposing such a cost are easy to envision. Defendants will simply refuse to engage in such conduct, which offers them no prospect of advantage. In the pres-

ent context, this means quite simply that academic people will decline to serve as references. As argued in Part I, this is to the detriment of future individuals who will be unable to obtain letters of recommendation, and of those institutions that cannot make intelligent admissions, appointments, or employment decisions without the sort of candid information that letters of recommendation contain.

The calculus of personal jurisdiction frequently takes into account the impact of asserting jurisdiction upon the actions of future parties. *Kulko v. Superior Court* provides perhaps the best example. The California Supreme Court below had held, and this Court agreed, that jurisdiction could not be predicated upon the fact that the mother resided in California. 19 Cal. 3d. at 523-524, 564 P.2d at 537; 436 U.S. at 93. "[T]o find personal jurisdiction in a State on this basis, merely because the mother was residing there, would discourage parents from entering into reasonable visitation agreements." *Id.* This Court also denied that jurisdiction should turn on whether the defendant had cooperated in his daughter's departure, as opposed to trying unsuccessfully to prevent it. Such a distinction, wrote this Court, "would impose an unreasonable burden on family relations." 436 U.S. at 98. Cooperative activity in difficult domestic situations should be rewarded, rather than being penalized by predicating jurisdiction upon it. The same is true with respect to candid letters of appraisal.

There are other situations in which personal jurisdiction analysis has turned on the deterrent consequences of asserting jurisdiction. The general rule, for example, is that witnesses voluntarily attending trials are immune from service of process. F. James & G. Hazard, CIVIL PROCEDURE 99 (3d ed. 1985). The underlying rationale was explained in *Stewart v. Ramsay*, 242 U.S. 128 (1916).

> [T]he administration of justice would in a variety of ways be obstructed, if parties and witnesses were

> liable to be served with process, while actually attending the court. It is often a matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if a *capias* might be served upon him.

242 U.S. at 129. See also, *Lamb v. Schmitt*, 285 U.S. 222 (1931). The most obvious evil consequence of asserting jurisdiction based upon the witness' presence is the one just mentioned: witnesses would be reluctant to enter the state. But there is an additional problem. The potential witness might fear that suit would turn on whether that party was pleased or displeased by the witness' testimony.

> Witnesses would [not only] be chary of coming within our jurisdiction, [but would also] be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony.

242 U.S. at 130-31.

A similar danger is presented by predicating jurisdiction upon the sending of a solicited letter of appraisal. Not only is the referee discouraged from writing a letter; unflattering letters are the ones least likely to be written because those are the ones likely to provoke litigation. If the decision of the court below is allowed to stand, the eventual result will be fewer letters of recommendation, or more unduly positive ones.

The decision below promotes the interests of one single individual, Dr. Burt, at the expense of not only individuals like Dr. Connolly who have written candid letters of appraisal, but also all other individuals who may need letters of recommendation in the future and of all of those institutions who need accurate information on which to base their decisions about individuals. The due process

minimum contacts calculus does not contemplate basing jurisdiction upon altruistic actions such as the mailing of a solicited letter of recommendation to a fortuitous forum.

CONCLUSION

For the foregoing reasons, *amici curiae* American Association of University Professors, American Council on Education, and Association of American Medical Colleges respectfully urge that the Court reverse the judgment of the court below.

Respectfully submitted,

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January 16, 1986